Supreme Court of the United States

OCTOBER TERM, 1920.

No. 293.

WESTERN UNION TELEGRAPH COMPANY,
Appellant,

against

S. B. POSTON,
Appellee.

BRIEF AS AMICI CURIAE ON BEHALF OF APPELLEE.

The construction of the contract between the appellant and the Postmaster General will affect generally the rights of numerous claimants against telegraph and telephone companies arising out of the operation under Government control. It will affect particularly the rights of a litigant we represent in an action entitled *Herstein* v. *New York Telephone Company,* now pending in the Supreme Court, State of New York, County of New York. Upon the written consent of the attorneys for both sides of this appeal, we ask leave of the Court to file this brief as *amici curiae* and respectfully

pray that, in the construction of the said contract and particularly Sections 8(e) and 15 thereof, the Court take into consideration the facts in the *Herstein* case, *supra*.

Facts.

Herstein, an infant, while walking on one of the streets in the City of New York, on February 26, 1919, received serious injuries due to the falling of a pole bearing telephone wires. The Telephone Company by its answer admits it erected the pole long prior to the joint resolution on July 16, 1918, and the proclamation and orders pursuant thereto, but disclaims liability for the injuries received by the plaintiff on the ground that its lines at the time of the accident were "under the operation and control of the Federal Government." The agreement between the New York Telephone Company and the Postmaster General is identical with the one between appellant and the Postmaster General in the present case (Exhibit No. 4, p. 41).

The Supreme Court of the State of South Carolina has affirmed the existence of liability against the wire company under the terms of this agreement. We submit that the following principles justify the decision of the Court:

1. We agree with appellant's view that a tort claimant would have no right of action against the United States (*Belknap* v. *Schild*, 161 U. S., 10, and other cases cited in appellant's brief). He either has his remedy directly against the wire company, or he has no remedy at all. If the contract between the wire company and the Postmaster

General is not capable of a construction that would protect both the wire company and the public, injuries to large numbers of claimants will go without remedy. The sections of the agreement involved are Section 8(e) and Section 15.

Section 8(e) (p. 46) provides, in part:

> "The Postmaster General shall * * * also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it, by reason of any cause of action arising out of Federal control, or anything done or omitted in the possession, operation, use or control of its property, during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States."

Section 15 (p. 73) provides:

> "In presenting this proposal it is understood that only the salient features incident to the relations of the parties have been described and that further details not covered arising from the operation of the property by the Postmaster General shall be settled in conformity with the broad principles herein enunciated."

In construing these two sections of the agreement, effect should also be given to the statement of the Postmaster General in his Order No. 1783 (Exhibit No. 3, p. 40), assuming control of the lines, that the purpose was to operate the lines as a national system "with due regard to the interest of the public and the owners of the property."

The sections just cited must be given some effect; they cannot be considered void. A contract must be so construed as to give meaning and effect to all its provisions.

Burdon Century Sugar Ref. Co. v. *Payne*, 167 U. S., 127, 142.
Hobbs v. *McLean*, 117 U. S., 567, 576.
U. S. v. *Central Pacific R. R. Co.*, 118 U. S., 235, 241.
Utley v. *Donaldson*, 94 U. S., 29, 46.
Binghamton Bridge, 3 Wall., 51, 73.

It will not be seriously contended by the appellant that either the Government or the wire company intentionally omitted provision in the agreement for the protection of such of the public as might be injured during the ordinary course of operation. The very insertion of Section 15 in the contract argues to the contrary.

2. Section 8(e) and Section 15, taken together and broadly construed, may be considered to be a provision for the protection of injured members of the public in suits against the wire company, as well as protection for the wire company by reimbursement from the Postmaster General. Any other construction would be harsh and unjust and would be contrary to the established rule that "When an instrument is capable of two constructions, one working injustice and the other consistent with the right of the case, that one should be favored which standeth with the right."

Norman v. *Bradley*, 9 Wall., 394, 407.
Utley v. *Donaldson*, *supra*.
Binghamton Bridge, *supra*.
Hoffman v. *Aetna Ins. Co.*, 32 N. Y., 405.

It must be assumed that the Postmaster General, in preparing this form of agreement, did not intend to deprive claimants of their common law remedies, and that he knew at the time of the execution of the agreement that tort claimants could not institute suits against the Government. We are forced to the conclusion, therefore, that he intended by the provisions of Section 8(e) to protect both the public and the companies; the former, because, by implication, suits were permitted against the companies; the latter, because, by express provision of the contract, he agreed to indemnify them against judgments recovered in such suits. In giving these provisions this fair and equitable construction no injury is done to the Government, for it is merely called upon to do what it agreed to do; no injury is done to the wire companies, for the Government is to reimburse them for all moneys so paid out; no injury is done to the public, for claimants are not then deprived of remedies for injuries sustained. The contrary construction urged by the appellant would be a harsh, inequitable and unjust one which would benefit only the party who framed the contract.

3. Order No. 2114 (Exhibit No. 4, p. 41), the agreement in question, is the form provided by the Postmaster General to all wire companies. If a doubt in the construction of its provisions arises, it must be construed strongly against the Postmaster

General, for language must be construed most strongly against the party employing it.

Grace v. *American Central Ins. Co.*, 109 U. S., 278, 282.
American Surety Co. v. *Pauly*, 170 U. S., 133, 144.
Insurance Companies v. *Wright*, 1 Wall., 456, 468.

4. It is respectfully submitted that the judgment of the Supreme Court of South Carolina should be affirmed.

WM. M. SILVERMAN,
JOSEPH P. TOLINS,
Counsel *amici curiae* on behalf of appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 293.

WESTERN UNION TELEGRAPH COMPANY,
PETITIONER,

vs.

S. B. POSTON.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA.

BRIEF OF WESTERN UNION TELEGRAPH COMPANY.

Statement of Case.

The question involved in this case is whether the Western Union Telegraph Company, herein called the telegraph company, can be held liable for failure to transmit, or for error or delay in transmitting, messages handled over its telegraph system in the United States during the period between August 1, 1918, and August 1, 1919, while its lines were in the exclusive and complete possession and control of the United

States, and being operated by the United States, under the provisions of joint resolution of Congress No. 834, adopted July 16, 1918, and the proclamation of the President issued pursuant thereto, July 22, 1918.

The controversy thus arose: On October 2 and 3, 1918, certain telegrams passed between the respondent, S. B. Poston, at Johnsonville, South Carolina, and W. B. Ravenel & Company, cotton brokers in Charleston, South Carolina, for the purpose of effecting a sale of two hundred bales of cotton. Alleging in his complaint that in response to his inquiry an offer for the cotton had been made by the brokers, but that by reason of delay in transmitting the offer and the acceptance thereof, he had lost a sale of the two hundred bales of cotton at the price quoted and was compelled, by reason of a decline in the market, subsequently to sell the cotton at a reduced price, the respondent commenced this action against the telegraph company, in the Court of Common Pleas for Williamsburg County, South Carolina, to recover as damages the difference between the price offered and the price at which he actually sold the two hundred bales of cotton (Transcript, pp. 2-4). The telegraph company, as defendant in the action, answered the complaint, and, besides pleading in substance a general denial and a specific denial that it was operating a telegraph line at the time the cause of action accrued, alleged by way of affirmative defense that under joint resolution of Congress No. 834, adopted July 16, 1918, the proclamation of the President, dated July 22, 1918, and the orders of the Postmaster General, its entire system was taken over by the United States and at the time the cause of action accrued was in the possession and control of and was being operated exclusively by the United States (Transcript, pp. 4-6).

In due course the case came on for trial in the lower court and the defendant saved all of its rights and contentions as to its non-liability by appropriate objections to testimony and

requests for instructions in its favor. All of its positions having been overruled, a verdict in favor of the plaintiff was rendered, judgment was thereupon entered, and an appeal was prosecuted to the Supreme Court of the State.

In this appeal the telegraph company contended:

1. That the possession, control and operation of its telegraph system by the United States at the time the cause of action accrued was such, under the Federal Constitution, the joint resolution of Congress and the proclamation of the President, as to prevent the maintenance of this suit against it, because such possession, control and operation on the part of the United States was in its sovereign capacity and was so complete and exclusive as to leave no ground upon which to base liability of the telegraph company, and the United States being the real party in interest, the suit could not be maintained against the United States in a State court, but, under the provisions of the Federal statutes, could only be maintained in the District Court or the Court of Claims of the United States, and

2. That the complete and exclusive possession, control and operation of its telegraph system by the United States in its sovereign capacity under the joint resolution of Congress and the proclamation of the President precluded any liability on the part of the telegraph company, for the reason that to hold otherwise would deprive the telegraph company of its property without due process of law and deny to it the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Federal Constitution (Transcript, pp. 57-59).

All of these contentions on the part of the telegraph company were overruled, and the judgment of the lower court affirmed by a unanimous opinion of the court filed on January 26, 1920 (Transcript, pp. 59-61). In this opinion, the

court stated that the judgment was "in form against the Western Union Telegraph Company" but "in effect against the Postmaster General," and that by reason of this the telegraph company could not successfully contend that in paying such judgment it would be deprived of its property without due process of law, as it would have the right to apply to the United States for reimbursement (Transcript, p. 61).

The telegraph company immediately filed a petition for a rehearing, in which it sought to show that the court had failed to apply to the decision of the case the principles of Federal law by which it was controlled; that under the facts as found by the court, judgment could neither be rendered nor liability established against either the telegraph company or the United States, for the reason as to the telegraph company that it was not engaged in the telegraph business or in any way concerned with the transactions set out in the complaint, and as to the United States that it was the real party in interest, and suit could not be maintained against it in a State court without consent granted by Congress, which had not been done, and therefore that the judgment rendered should have been held a nullity as to both (Transcript, pp. 62-63). The telegraph company contended further in this petition for a rehearing that by the affirmance of the judgment below the court had established liability against it for the acts of the United States and had placed a lien on its property and not on the property of the United States; that the plaintiff had the right to collect such judgment by the sale of its property under the levy of an execution; that the effect of this was not only to take its property to pay the debts of the United States, but in addition to allow a third party to take such property in enforcing a liability against one in no way legally responsible for it, and that such a result deprived it of its property without due process of law and denied to it the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States (Transcript, pp. 64-68).

The contentions of the telegraph company so made in its petition for a rehearing were overruled, and the petition dismissed by an order filed February 23, 1920 (Transcript, p. 69). Thereupon, the telegraph company applied to this court under the provisions of section 237 of the Judicial Code as amended by the act of September 6, 1916 (39 Stat. at L., 726) for a writ of certiorari to the Supreme Court of South Carolina. Upon consideration of such application, the writ was granted by this court on April 26, 1920, and the case comes here pursuant thereto.

Specification of Errors.

While there is no formal assignment of errors, since the case comes up by certiorari, yet logically it is essential to the determination of the existence of error in the final result of adjudication of liability against the defendant that the errors committed in reaching this result should be fully exposed, for if it be shown that the premises are without legal foundation, manifestly the deduction drawn therefrom falls for the lack of support.

As fairly appears from the record, and especially from the issues raised by the defendant, the errors so committed may be thus stated:

1. Error in holding, notwithstanding the exclusive and complete possession, control, and operation of the system of the telegraph company by the United States at the time the cause of action herein accrued and the fact that such cause of action arose out of a transaction had exclusively with the United States in the operation of such system, that this suit could be maintained and a judgment rendered therein against such telegraph company.

2. Error in holding that an individual citizen has the right to recover against the telegraph company on a cause of

action growing out of a transaction had exclusively with the United States in the operation of the telegraph system of such company while such system was in the complete and exclusive possession and control of the United States, a judgment in the State courts which will be effective and operative against the United States, when neither consent to bring nor jurisdiction to maintain in the State courts such indirect suit has ever been given.

3. Error in holding that a recovery against the telegraph company in this case does not deprive such company of its property without due process of law, and in not holding that the entire system of such company having been seized *in invitum*, the joint resolution would violate the Fifth Amendment to the Federal Constitution if it imposed liability upon such company for the acts of the United States during the period of Federal possession, control, and operation of its system, because this would make the company liable for the debts of the United States and authorize the taking of its property for the private use of persons whose real claims were against the United States and would thus deprive such company of its property without due process of law.

4. Error in holding that a recovery against the telegraph company in this case does not deprive such company of its property without due process of law, and in not holding that, the entire system of such company having been seized *in invitum* and the joint resolution of Congress not having attempted to impose any liability upon such company for the acts of the United States during the period of Federal possession, control, and operation of its system, the action of the State courts in imposing such liability upon the company would violate the provisions of the Fourteenth Amendment to the Federal Constitution, as it would compel such company to pay the debts of the United States and authorize the taking of the property of the company for the private use

of a person whose real claims were against the United States and thus deprive it of its property without due process of law and deny to it the equal protection of the laws.

The issues thus raised will be considered under three heads, to wit:

1. Federal possession, control and operation of the telegraph systems, and liability of the telegraph company thereunder (first error).

2. Federal possession, control, and operation of the telegraph systems, and liability of the United States thereunder (second error).

3. Constitutional objections to the maintenance of this suit and the recovery of a judgment therein effective against the owner telegraph company (third and fourth errors).

BRIEF OF ARGUMENT.

I.

FEDERAL POSSESSION, CONTROL, AND OPERATION OF THE TELEGRAPH SYSTEMS, AND LIABILITY OF THE TELEGRAPH COMPANY THEREUNDER.

This issue presents two aspects, viz:

1. Nature and extent of Federal possession, control, and operation of the telegraph systems pursuant to the joint resolution of Congress and the proclamation of the President.

2. Liability of the telegraph company under the joint resolution and the proclamation for the acts of the United States during its possession, control, and operation of the telegraph system.

These two propositions will be discussed in their order.

1. **Nature and extent of Federal possession, control, and operation of the telegraph systems pursuant to the joint resolution of Congress and the proclamation of the President.**

On July 16, 1918, the Congress of the United States passed joint resolution No. 834 (40 Stat. at L., 904, chap. 154; Fed. Stat. Ann., 2d ed., Supplement 1918, p. 834), which provided:

> "That the President during the continuance of the present war *is authorized and empowered*, whenever he shall deem it necessary for the national security or defense, to supervise or *to take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war*, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided*, That just *compensation* shall be made for such supervision, possession, control, or operation, to be determined by the President; * * * *Provided further*, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems." (Italics added.)

Six days thereafter, on the 22d of July, the President exerted the power thus given. Its exercise was manifested by a proclamation which, after reciting the resolution of Congress, declared:

> "It is deemed necessary for the national security and defense to supervise and to *take possession and as-*

sume control of all telegraph and telephone *systems* and to operate the same in such manner as may be needful or desirable:

"Now, therefore, I, Woodrow Wilson, President of the United States, under and by virtue of the powers vested in me by the foregoing resolution, and by virtue of all other powers thereto me enabling, do hereby *take possession and assume control and supervision of each and every telegraph and telephone system, and every part thereof, within the jurisdiction of the United States, including all equipment thereof and appurtenances thereto whatsoever and all materials and supplies.*

"It is hereby directed that the supervision, possession, control, and operation of such telegraph and telephone systems hereby by me undertaken shall be exercised by and through the Postmaster General.

* * * * * * *

"From and after twelve o'clock midnight on the 31st day of July, 1918, *all telegraph and telephone systems included in this order and proclamation shall conclusively be deemed within the possession and control and under the supervision of said Postmaster General without further act or notice.*" (Exhibit 2, Transcript, pp. 38-39.) (Italics added.)

The proclamation further gave to the Postmaster General plenary power to exert his authority to the extent he might deem desirable through the existing "owners, managers, boards of directors, receivers, officers, and employees of said telegraph and telephone systems," and it was provided that they should continue the operation of the various systems "in the usual and ordinary course of the business of said systems, in the names of their respective companies, associations, organizations, owners, or managers, as the case might be," until the Postmaster General by general or special orders should otherwise provide.

These provisions as to the retention in the service of the

owners, officers, and employees of the companies, however, in no sense signified an intention on the part of the President to exert over the wire systems *"a mere public supervision of an operation by private owners."* On the contrary, their sole and manifest purpose was to provide for the uninterrupted operation of the systems by retaining in the service trained and competent persons to conduct the business for the Government.

Under authority of the proclamation the Postmaster General assumed possession and control of the wire systems, and on August 1, 1918, made provision for conducting the business thereof by issuing a bulletin, in which, after reciting that he had assumed possession and control, he stated that the systems should "continue operation in the ordinary course of business," and directed that "all officers, operators, and employees" of the companies would "continue in the performance of their present duties" (Exhibit 3, Transcript, p. 40).

On October 9, 1918, the President, through the Postmaster General, in carrying out the duty imposed upon him by the joint resolution to make compensation, concluded a contract with the telegraph company of the most comprehensive character, covering the whole field while the possession, control, and operation of its system by the United States continued (Exhibit 4, Transcript, pp. 41-51). By its terms, stipulated amounts were to be paid as compensation for the possession, control, and operation of the system by the United States, and the earnings resulting therefrom became the property of the United States. Although concluded in October, 1918, the contract, by its express terms, was made retroactive so as to be held effective from the time the President took over the property.

The status between the United States and the telegraph company thus created by the joint resolution and the proceedings taken pursuant thereto continued until August 1, 1919, when the wire lines were returned to their owners (Act

of July 11, 1919, 41 Stat. L., 157; Fed. Stat. Ann., 2d ed., 1919 Supp. 350). All questions as to the legal relationship resulting from such status would seem to be set at rest by the recent adjudications of this court on this and the closely analogous situation of the transportation companies.

The leading case respecting the wire companies is *Dakota Central Telephone Co. vs. South Dakota ex rel. Payne*, 250 U. S., 163 (63 L. Ed., 910), where the nature and extent of the possession and control of their properties by the United States were fully considered and determined by this court.

The case involved the right of the United States, through the Postmaster General, to fix intrastate rates on the wire lines during Federal control and operation, and it was strenuously urged in behalf of the State in denial of the existence of such a right on the part of the United States that by the resolution "only a limited power as to the telephone lines was conferred upon the President, and hence that the assumption by him of complete possession and control was beyond the authority possessed." Answering such contention this court said:

> "But although it may be conceded that there is some ground for contending, in view of the elements of authority enumerated in the resolution of Congress, that there was power given to take less than the whole if the President deemed it best to do so, we are of opinion that authority was conferred as to all the enumerated elements, and that there was hence a right in the President to take complete possession and control to enable the full operation of the lines embraced in the authority. The contemporaneous official steps taken to give effect to the resolution, the proclamation of the President, the action of the Postmaster General under the authority of the President, the contracts made with the telephone companies in pursuance of authority to fix their compensation, all establish the accuracy of this view, since they all make it clear that it was assumed that *power to take*

> *full control was conferred,* and that *it was exerted so as to embrace the entire business and the right to the entire revenues to arise from the act of the United States in carrying it out.* Indeed, Congress, in subsequently dealing with the situation thus produced, would seem to have entertained the same conception as to the scope of the power conveyed by the resolution, and dealt with it from that point of view. Act of October 30, 1918, 40 Stat. at L., 1017." (Italics added.)

The decision of the Supreme Court of the State denying the authority of the United States to fix the rates under consideration was based on its conclusion that the power of the State with reference thereto had been preserved by the proviso of the resolution saving "the lawful police regulations of the several States." Concerning this, the court said:

> "Conceding that it was within the power of Congress, subject to constitutional limitations, to transplant the state power as to intrastate rates into a sphere where it, Congress, *had complete control over telephone lines because it had taken possession of them and was operating them as a governmental agency,* it must follow that in such sphere there would be nothing upon which the state power could be exerted except upon the power of the United States; that is, its authority to fix rates for the services which it *was rendering through its governmental agencies.* The anomaly resulting from such conditions adds cogency to the reasons by which, in the *North Dakota Case,* the error in presuming *the continuance of State power in such a situation was pointed out, and makes it certain that such a result could be brought about only by clear expression, or at least from the most convincing implication.*" (Italics added.)

We would remark in passing that a similar construction had been previously given the proviso by the district court in the case of *Southwestern Tel. & Tel. Co. vs. Houston,* 256 Fed., 690.

On the same day and preceding the decision of the telephone case, this court decided the case of *Northern Pacific Railway Co. vs. North Dakota ex rel. Langer*, 250 U. S., 135 (63 L. Ed., 897), involving the right of the United States, through the Director General, to fix local or intrastate rates for transportation services. Such authority on the part of the United States was affirmed to exist, and referring to that case this court in the opening paragraph of its opinion in the *Dakota Central Telephone Company* case has this to say:

> "Involving, as this case does, the existence of State power to regulate, without the consent of the United States, telephone rates for business done wholly within the State, over lines taken over into the possession of the United States, and *which, by the exercise of its governmental authority, it operates and controls*, it does not in principle differ from the *North Dakota case* just announced (250 U. S., 135), where it was decided that, under like conditions, the State had no such power as to railroad rates. We consider this case, as far as may be necessary, by a separate opinion, however, because the authority under which the control was exerted is distinct, and because of the assumption in argument that this distinction begets a difference in the principles applicable." (Italics added.)

In the North Dakota case we find this pertinent language concerning the nature and extent of the possession and control of the transportation systems by the United States:

> "No elaboration could make clearer than do the act of Congress of 1916, the proclamation of the President exerting the powers given, and the act of 1918, dealing with the situation created by the exercise of such authority, that *no divided* but *a complete possession and control* were given the United States for all purposes as *to the railroads in question*. But if it be conceded that, despite the absolute clarity of the provisions concerning the control given the United States, and the all-embracing scope of that control,

there is room for some doubt, the consideration of the general context completely dispels hesitancy. How can any other conclusion be reached if consideration be given the comprehensive provisions concerning the administration by the United States of the property which it was authorized to take, the financial obligations under which it came, and all the other duties and exactions which the act imposed, contemplating *one* control, *one* administration, *one* power for the accomplishment of the *one* purpose, the *complete* possession by *governmental authority to replace for the period provided the private ownership theretofore existing?* This being true, it must follow that there is no basis for the contention that the power to make rates and enforce them, which was plainly essential to the authority given, was not included in it." (Italics added.)

The case of *Burleson vs. Dempey*, 250 U. S., 191 (63 L. Ed., 929), involved the same question as to the telegraph companies. In disposing of the case the court said:

> "As there is no difference in legal principle as to the question of power between the *Dakota Central Telephone Company case* and this, it follows that the decision in that case is conclusive here and makes certain the error committed below."

In *Public Service Commission vs. New England Tel. & Tel. Co.*, 232 Mass., 465, 122 N. E., 567, which was affirmed by this court in *McLeod vs. New England Tel. & Tel. Co.*, 250 U. S., 195 (63 L. Ed., —), the Commission sued the telephone company to enforce State rates, and the company set up the joint resolution of Congress and the seizure of its lines thereunder and the operation thereof by the Postmaster General; that the United States, the President or the Postmaster General was a necessary party, and that to grant the relief prayed would in effect restrain the United States. The court, speaking through the Chief Justice, held that the United States was alone concerned, and that the effect of the congressional

and presidential action and the action of the Postmaster General was—

> *"Not a mere public supervision of an operation by private owners. It was a complete assumption of absolute and complete possession and control to the exclusion of every private interest.* No distinction is made by their terms between interstate service and intrastate service. Both alike are taken into the possession of the United States. Powers so extensive as were thus assumed can be exercised only through various governmental agencies but the right and power of the Government are paramount and admit of no associates." (Italics added.)

The same rulings have been made in the following cases:

Kansas vs. Burleson, 250 U. S., 188 (63 L. Ed., 926).

Commercial Cable Co. vs. Burleson, 250 U. S., 360 (63 L. Ed., 1030).

Commercial Cable Co. vs. Burleson, 255 Fed., 99.

Railroad Commissioners vs. Burleson, 255 Fed., 604.

Southwestern Tel., etc., Co. vs. Houston, 256 Fed., 690, and cases cited.

Mardis vs. Hines, 258 Fed., 945.

Hatcher & Snyder vs. Atchison, etc., R. Co., 258 Fed., 952.

Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.

Nash vs. Southern Pac. Co., 260 Fed., 280.

State vs. Cumberland Tel., etc., Co., 120 Miss., 25; 81 South., 404, and 82 South., 311.

State vs. Burleson (Ala.), 82 South., 458.

Canidate vs. Western Union Tel. Co. (Supreme Court of Alabama), 85 South., 10—(not yet officially reported).

Western Union Tel. Co. vs. Wallace (Texas Court of Civil Appeals)—not yet reported.

Western Union Tel. Co. vs. Glover (Court of Appeals of Alabama)—not yet reported.

Foster vs. Western Union Tel Co. (Court of Appeals of Missouri), 219 S. W., 107.

Western Union Tel. Co. vs. Davis (Ark.), 218 S. W., 833.

Western Union Tel. Co. vs. Conditt (Texas Court of Civil Appeals), 223 S. W., 224)—not yet officially reported.

Mitchell vs. Cumberland Tel. Co., 188 Ky., 263; 221 S. W., 547.

In brief, these decisions definitely and indisputably establish two propositions respecting the status arising from the seizure, *in invitum*, of the systems of the wire companies by the United States, viz: (1) that *"it was a complete assumption of absolute and complete possession and control, to the exclusion of every private interest" and all State authority*, the resolution "contemplating *one control, one administration*, and *one power* for the accomplishment of the" governmental purpose; and (2) that in carrying on the business of such systems, the United States not only had exclusive control, but was actually *"operating them as a governmental agency."* Therefore, in the light of these controlling adjudications, there can be no question but that during the period of Federal possession and control extending from August 1, 1918, to August 1, 1919, the United States was in the *absolute, complete, and exclusive possession and control* of the systems of the wire companies and was *operating them as governmental agencies.*

2. **Liability of the telegraph company under the joint resolution and the proclamation for the acts of the United States during its possession, control, and operation of the telegraph system.**

It being conclusively established that the wire systems were in the absolute, complete, and exclusive possession and con-

trol of the United States, which operated them as governmental agencies, the question next logically arising is whether under these conditions suit can be maintained by and judgment rendered in favor of a private citizen against an owner telegraph company for an act of nonfeasance or malfeasance of the agent of the United States in the performance of his duties to the United States in the conduct of the telegraph business.

If the *possession* and *control* of the entire system by the United States was *complete, absolute,* and *exclusive,* then there was *no* possession and control left in the corporation owner, and such owner was in no way concerned with the property, and if the conduct of the telegraph business by the United States was the *operation of a governmental agency,* then the owner corporation was excluded from such operation. From these premises, the conclusion irresistibly follows that the owner telegraph company cannot be held liable to a private citizen respecting a transaction had between such citizen and the United States in the conduct of this agency of the Government, unless either expressly or impliedly made so by valid congressional or presidential action, or by force of law in existence at the time of and unimpaired by the acts of the United States in seizing its property.

The State Supreme Court in its decision expressed the opinion that authority for a recovery against the telegraph company was to be found in both the proclamation of the President and the order of the Postmaster General (Transcript, p. 61). This conclusion, however, would seem to be unfounded, for examination of the proclamation and order discloses that nothing therein contained contemplates or provides for either the maintenance or the bringing of a suit. It is true, the proclamation permits the Postmaster General to perform the duties imposed "so long and to such extent and in such manner as he shall determine through the owners, managers, boards of directors, receivers, officers, and employees of said telegraph * * * systems," and con-

tinues these in the operation of the business in the usual and ordinary course until the Postmaster General shall by general or special order otherwise provide (Transcript, p. 39). The order of the Postmaster General issued in assuming possession and control of the systems merely carries out the authority granted to him by the proclamation as to the operation thereof by retaining the officers, operators, and employees in the service and entrusting to them the duties of actual operation (Transcript, p. 40).

The evident purpose of the authority so granted and exercised was, as we have already said, to prevent any interruption in the business by having it conducted by trained and competent men, but they were *none the less agents and employees of the United States* engaged in a business *exclusively* and *completely* in the *possession and control of the United States*. Hence, no basis for the asserted liability of the telegraph company can be found either in the proclamation of the President or the order of the Postmaster General.

Nor can any basis for liability against the owner corporations be found in the joint resolution which authorized the seizure of their properties. In fact, this joint resolution gives no permission to sue either the corporations or the Postmaster General. It is true that by a proviso the joint resolution saved "the lawful police regulations of the several States," but as we have already seen, this court, in the *Dakota Central Tel. Co. case*, held that this provision had reference only to "State power to deal with the health, safety, and morals of the people," and that the systems of the telephone and telegraph companies had been taken into a sphere where Congress had complete control over the lines, *"because it had taken possession of them and was operating them as a governmental agency."* Under this state of facts, the court said that "it must follow that in such sphere there would be nothing upon which the State power could be exerted except upon the power of the United States" and that the anomaly of allowing the State a right of operation on the power of the

General Government was such a result that "could be brought about only by clear expression or at least from the most convincing implication." Neither clear expression nor convincing implication was found in the resolution to authorize interference by the State with the making of intrastate rates by the Government during the period of its control and operation; neither is there clear expression nor convincing implication to be found in the resolution allowing suits against the owner telegraph corporations for acts of the Federal Government in operating their properties, and if in the one case such a power was denied as being neither expressed nor implied, it necessarily follows that for the same reasons it must be denied in the other.

The soundness of this conclusion is further demonstrated by a comparative examination of the action authorizing and providing for Federal control of the railroad lines. In the proclamation of the President of December 26, 1917, taking possession of these lines, it was distinctly provided that suits might be brought against the carriers and judgments rendered as theretofore until the Director General by general order should otherwise determine. Thereafter, on March 21, 1918, Congress passed an elaborate Federal control act relating to these carriers (40 Stat. at L., p. —, Fed. Stat. Ann., 2d ed., 1918 Supp., p. 757), section 10 of which expressly provides:

> "Actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law; and in any action at law or suit in equity against the carrier, no defense shall be made thereto upon the ground that the carrier is an instrumentality or agency of the Federal Government. Nor shall any such carrier be entitled to have transferred to a Federal Court any action heretofore or hereafter instituted by or against it which was not so transferable prior to the Federal control of such carrier."

Leaving out of view for the present all questions as to the constitutionality of this provision, the point to be emphasized is that *neither the joint resolution granting nor the proclamation exerting the authority to seize the wire systems contains anything analogous thereto.* On the contrary, they are absolutely silent both as to the liability of the owner corporations and of the United States; and equally silent respecting the right to bring and maintain suits. Nor was this silence the result of accident. On the contrary, it was the result of deliberate design, for, as appears from the discussions in the Senate when the joint resolution was adopted and when the act providing for the return of the wire systems to their owners was under consideration, the question of incorporating in each a provision similar to section 10 of the Federal railroad control act, *supra*, was fully considered and intentionally omitted. These discussions appear in the Congressional Record of July 13, 1918, and of June 10, 1919, respectively, and the relevant portions thereof will be found fully set out in the Appendix hereto as Exhibit A. So that there is no room for contending that while the joint resolution does not expressly attempt to fix liability on the owner corporations, yet impliedly, at least, this must have been the intention of Congress, for the reason that such contention is utterly incompatible with what was deliberately and designedly done by Congress in refusing to make such a provision a part either of the joint resolution or of the subsequent act returning the properties.

Following the passage of the Federal control act of March 21, 1918, the Director General of Railroads issued, pursuant thereto, a number of general orders, which were approved before issuance by the President, and in which, while distinctly recognizing the right of suit, he directed that all suits must be brought against the Director General and *not against the owner corporations.* The reason for this is thus given in the preamble to the Director General's General Order No. 50:

> "Whereas, since the Director General assumed control of said systems of transportation, suits are being brought and judgments and decrees rendered against carrier corporations on matters based on causes of action arising during Federal control, for which the said carrier corporations are not *responsible*, and it is right and proper that the actions, suits, and proceedings hereinafter referred to, based on causes of action arising during or out of Federal control, should be brought directly against the said Director General of Railroads and not against said corporations." * * * (Then follows an order directing the suits to be brought against the Director General and not otherwise.) (Italics added.)

In the case of *Schumacher vs. Pennsylvania Railroad Company*, 106 N. Y. Misc., 564; 175 N. Y. Supp., 84, the court holds that section 10 of the Federal control act, authorizing suits against carrier corporations during the period of Federal control on causes of action arising during such control, violates the Fifth Amendment to the Federal Constitution, and that the foregoing order of the Director General, stating that the carriers were not responsible for these causes of action, was designed to remove such constitutional objection. At page 91 we find this language:

> "It is safe to assume that the Director General of Railroads would not have issued the order in question, except upon the advice and after consultation with the highest legal advisers of the Government, and that it was promulgated only after the most careful and mature consideration of the constitutional and legal questions presented. We are safe, we think, in concluding that the order represents the considerate judgment of the Government authorities on the questions we have been considering in this opinion."

Whether a provision in the act granting authority to take over the lines similar to that found in section 10 of the Federal control act, *supra*, fixing liability on the owner corpora-

tions for the acts of the United States, would be constitution
is a question we reserve for subsequent consideration. Su
fice it to say at this stage that no such provision, either e
pressly or impliedly, exists; hence so far as congressional
presidential action is concerned, the liability of the telegra
company depends on the status created by the seizure of
of its properties by the United States. As was held by th
court in the *North Dakota case*, *supra*, this status was "
divided but a *complete* possession and control" by the Unit
States "for all purposes," "contemplating *one* control, *o*
administration, *one* power for the accomplishment of the *o*
governmental authority to replace for the period provided t
private ownership theretofore existing," thus affording
room for contending that the telegraph company as such ha
any control whatever over either the system or its operatio
Nor is this result altered in the least degree by the fact th
the operators and agents who handled the messages involv
herein were originally the employees of the telegraph co
pany. At this time they were solely and exclusively t
agents of the United States, and the telegraph company ha
been completely excluded from all connection with the pro
erties. Hence, instead of finding congressional or preside
tial action either expressly or impliedly asserting liabili
against the owner corporations, we find such action negati
ing such liability by creating a status, the nature and effe
of which was to take the systems absolutely away from the
owners and exclude such owners from any participation
their operation. The instant case is therefore governed
the principles of the *North Dakota case* and the *Dakota C*
tral Telephone Company case, under which principles neith
can liability be predicated nor recovery had against the te
graph company for the negligent or wilful acts of the e
ployees of the United States in their conduct of the telegra
business.

The conclusion thus reached as the result of independe
reasoning is fully supported by numerous recently decid
and well-considered cases.

In *North Dakota vs. Northwestern Telephone Exchange Co. et al.* (U. S. Dist. Ct., North Dakota), — Fed., — (not yet reported), a bill in equity was filed by the State to enjoin the collection of intrastate telephone rates promulgated by the Postmaster General. The corporation moved to dismiss the bill as to it, which motion was granted, the court, by Judge Amidon, saying:

> "In the case of the telephone companies there is *no reservation in the joint resolution* of Congress authorizing the President to take over telegraph and telephone lines, *permitting either the companies or the Postmaster General to be sued, nor is any such permission contained in the proclamation of the President.* The acts of the National Government in regard to telephone and telegraph lines in this particular are wholly different from the statute that was passed authorizing the taking over of railroads. By section 10 of that statute full provision is made in regard to suits against the companies and clothing the Interstate Commerce Commission with power to supervise any changes in rates made by the President or under his authority while the railroads remain in his control. As *no such permission* is contained in the joint resolution and the proclamation of the President in regard to the telephone and telegraph companies, it seems to me that *the general principle must hold, and that is, that no suit can be brought in respect of those properties while they are so held either by the State or by any officer acting under authority of the State.*" (Italics added.)

The case of *Railroad Commissioners vs. Burleson et al.*, 255 Fed., 604, likewise sought to enjoin the putting into effect of a schedule of intrastate telephone rates. The court refused the injunction, and held that the owner telephone corporation was "not responsible for the regulations" of the United States, was "not a proper party to the bill and as to it, the bill should be dismissed."

This precise question of the liability of the owner tele-

graph corporation on transactions had between the public and the United States in the operation of its system has been recently presented to and passed upon by the courts of Alabama, Arkansas, Kentucky, Missouri, and Texas, and each of these courts has declared that suit cannot be maintained against the telegraph company.

The case of *Canidate vs. Western Union Tel. Co.* (Supreme Court of Alabama), 85 South., 10—not yet officially reported—was a suit against the corporation to recover damages for the failure, during Federal operation, to transmit a telegram. Ruling that the action would not lie, the Supreme Court of Alabama said:

> "The *complete* control and the *exclusive* possession of this, as well as all other wire lines within the resolution of Congress, as effected through the proclamation of the President, having passed to the United States, the defendant (appellee) was not and could not have been engaged in the business described in the complaint except, and that only, under the *derivative* authority, a mere agency, imposed upon the telegraph company by the paramount governmental processes set forth in the plea, to the end that whatever service the physical properties and the company's personnel might render in the transmission of intelligence by wire should be and was a public, governmental service or function, to or in respect of the discharge of which,—within the realm of the company's legitimate activity under the complete control and exclusive possession of the Government,—*neither the company*, as such, nor the persons so serving in the operation of any of the functions of the company so dominated, were *subject to individual corporate or personal liability to third persons for a breach of a contract or for a tort* (the breach of a public duty) *predicated alone on a contract for the transmission of intelligence by wire.*" (Italics added.)

Western Union Telegraph Co. vs. Wallace (Texas Court of Civil Appeals)—not yet reported—was an action to recover

for mental anguish alleged to have resulted from delay in the transmission of two telegrams on the 20th and 21st of October, 1918. The judgment for the plaintiff in the court below was reversed, the court using this language:

> "It can hardly be seriously contended that if the Government of the United States, either by lawful means or by force, dispossessed appellant of its telegraphic system and operated the same *through and under the direction of the officers, agents, and employees of the Government, appellant could be held liable for any wrongful act of the Government* whereby another suffered injury. This is true regardless of whether or not appellee has a remedy for the wrongs committed by the Government resulting in injury to him. *Schumacher vs. Ry. Co.*, 175 N. Y. Supp., R., 84; *Edwards vs. Jones*, 12 Daly, N. Y., 415. *By what process of reasoning can it be held that appellant can be held liable for the acts of the Government over which it had no control whatever? Can it be thought that where one person takes property of another, without his consent, and against his protest, and thereafter wrongfully uses the same so as to bring about damage to a third person, such third person can recover against the owner such damages so suffered, solely because such third person has no remedy against the wrongdoer?"* (Italics added.)

After reviewing the congressional and presidential action, the action of the Postmaster General, and after considering the *North Dakota* and the *Dakota Central Telephone Co. cases*, the court concluded:

> "Having reached the conclusion that no liability is shown against appellant, the judgment of the trial court is reversed and judgment is here rendered for appellant."

This case has been followed in the subsequent case of *Western Union Tel. Co. vs. Conditt* (Texas Court of Civil Appeals), 223 S. W., 224—not yet officially reported.

The next case is *Western Union Telegraph Co. vs. Glover* (Court of Appeals of Alabama)—not yet reported—which was an action for breach of contract in failing to deliver a telegram promptly. The plaintiff recovered judgment, which was reversed on appeal, the court ruling:

> "Whatever contract was made with reference to the message, was with the manager of the telegraph office at Selma, Alabama, November 14, 1918, at a time when all of the defendant's property was in the possession of the United States Government, and the defendant corporation, together with all of its operators were under the direction and control of the Federal authorities, acting under the powers conferred by Congress by joint resolution July 14, 1918, and the proclamation of the President, July 22, 1918. * * * But whatever services were being rendered by the corporation to the Federal Government, *it was no part of its duty to make contracts for the transmission of messages. This service had been assumed by the Government itself and was being carried on by its employees and agents* in charge of the local officers who acted under instructions, not from the corporation, but from the Postmaster General. Under these circumstances telegraph services and facilities afforded the public by the Government during the period of its control, were afforded, not as a matter of right which the public could demand, but as a matter of discretion on the part of the Government and as to which, *the corporation was in no way concerned.* In other words, when the Postmaster General, acting under the law, took possession of the physical properties of defendant and control of the defendant, the defendant became the agent of the Government subject to instructions, just as any other instrumentality drafted for service during the war. True, it maintained its corporate existence, but certain of its powers were suspended, and it retained no control over its property or employees, except subject to the orders of the Government. *Dakota Cent. Tel. Co. vs. South Dakota,* Vol. 39, Sup. Ct. Reporter, 507.
>
> "This being the law, the plaintiff as well as every

one else was charged with knowledge and hence it cannot be claimed he was dealing with an agent who did not disclose his principal. Being an agent of the Government, even if it did make the contract sued on, the contract was public and not personal. *Hodgson vs. Dexter*, 1 Cranch (U. S.), 345. Being a public and not a private contract it imposes no personal liability." (Italics added.)

In the case of *Foster vs. Western Union Telegraph Co. et al.* (Missouri Court of Appeals), 219 S. W., 107, the question arose and was decided in favor of the company, the court saying:

> "*No suit could possibly be instituted against the Western Union Telegraph Company, because* it has been expressly held by the highest authority that when the President, acting under the power given him by Congress, took charge of the telegraph lines of the United States, *such lines were then operated as a Government agency* * * *
>
> "The judgment in this case is clearly erroneous and without foundation of law, and must be reversed." (Italics added.)

The next case is *Western Union Telegraph Company vs. Davis* (Supreme Court of Arkansas), 218 S. W., 833, wherein the lower court allowed a recovery for mental anguish alleged to have resulted from delay in the transmission and delivery of a message, which was reversed by the Supreme Court of Arkansas, which said:

> "Appellant pleaded the complete control of the Government over the physical properties of the company in the operation of the telegraph business as a defense against any liability which accrued by reason of negligence during such Government control and operation.
>
> "The question presented by this plea is the sole question involved in the case, and the contention now is that the telegraph company is not liable for damages caused by the servants of the Government in op-

erating the lines, and that there is no authority under the Federal law for maintaining an action against the telegraph company for a cause of action which arose under Government control.

"We are of the opinion that this contention is sound and must be sustained.

"Learned counsel for appellee defend the judgment below under authority of the proviso in the Federal statute which preserves the authority to the States in the exercise of 'lawful police regulations.' The argument is that the liability imposed on telegraph companies for damages by way of mental anguish resulting from negligence in the transmission of messages is in the nature of a police regulation, the vitality of which is preserved in the Federal statute.

"This contention overlooks, however, the decision of the Supreme Court of the United States in the recent case of *Dakota Central Telephone Co. vs. State of South Dakota*, 250 U. S., 163; 39 Supp. St., 507; 63 L. Ed., 910, which interprets the language of the joint resolution of Congress and gives a definition to the term 'police regulations'; that it means the exercise of the police power of the State in a restricted sense, limiting it to that phase of the power which deals with 'health, safety and morals,' and not in the comprehensive sense which embraces the substance of the whole field of State authority. *The assumption of control by the Postmaster General was complete, and constituted a substitution of the Government for the owners of the telegraph lines in the operation of the same. The possession and control of the owners was entirely displaced, and the act of negligence complained of was committed, not by the servants and employees of the telegraph company, but by the servants and agents of the Government. There was no liability resting upon the telegraph company for the act of the Government and no such liability was created by statute.* * * *

"We see no escape from the conclusion that there is no liability in this case for the injury complained of. The judgment is therefore reversed, and the action dismissed." (Italics added.)

The question came before the Kentucky Court of Appeals in *Mitchell vs. Cumberland Telephone, etc., Co. et al.*, 188 Ky., 263; 221 S. W., 547, which was a suit to recover for personal injuries received by plaintiff while assisting in unloading some telephone poles from a car, and liability was held not to exist, the court, after a full review of the cases, saying:

> "As said in the cases, *supra*, if suits of this kind could be maintained under the circumstances, then indeed could property be taken without *any* process of law, since the only pretended claim to it would be that the defendant owned the property which was being operated at the time of the happening of the injury sued for though it was then entirely out of his control and was taken without his consent. The fact that the plaintiff might be remediless because there is no provision for any suit against the United States (although regrettable) cannot strengthen his case. Numerous instances exist in this State where there is no remedy furnished for similar injuries. No county can be sued for negligence in the maintenance of its public roads; nor can a municipality, however negligent, be made to respond in damages for injuries inflicted while exercising a governmental function. In neither of those cases is there as potent reasons for withholding liability as exists in this case.
>
> "The case of *Witherspoon & Sons vs. Postal Telegraph & Cable Company*, 257 Fed. Rep., 758 (decided by the United States District Court for the Eastern District of Louisiana), relied on by appellant is the only one announcing a contrary view, and it is expressly discarded by some of the cases, *supra*, and was decided before the opinion of the Supreme Court was rendered in the Dakota case. We do not, therefore, regard it as authority.
>
> "From the foregoing authorities there seems to be no alternative but to affirm the judgment, which is accordingly done."

Notwithstanding the broader scope and the more elaborate provisions, including one respecting suits, of the congressional legislation and the action pursuant thereto in respect

to the transportation lines, the Federal decisions on Federal control of railroads all establish the non-liability of the corporations for the acts of the employees of the Director General. Hence they strongly sustain the position that the wire companies cannot be held liable for the acts of the employees and agents of the Postmaster General in his operation of the properties for the United States. Reference will be made to a few of these decisions.

Thus in *Rutherford vs. Union Pacific R. Co.*, 254 Fed., 880, we find this statement:

> "It would have been an anomaly to have given the actual control of the railroads to the Director General, and to have provided that suits arising out of his acts should be brought against the corporations who had been divested of authority over those acts."

And in *Mardis vs. Hines*, 258 Fed., 945, the court says:

> "From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The railroad company has nothing to do with such operation. When the Director General assumed control all the employes on the railroad ceased to be employes of the railroad company and became employes of the Director General. At that time the relation of master and servant ceased to exist between the employes operating the railroad and the railroad company. That relation then began and still exists between such employes and the Director General.
>
> * * * * * * *
>
> "In my opinion the judgment sought to be recovered against the railroad company is inconsistent with the acts of Congress and the order of the President."

Again, in *Hatcher & Snyder vs. Atchison, etc., R. Co.*, 258 Fed., 952, we find this ruling:

> "Since the opinion in the North Dakota case there is no further doubt as to the extent of the power given the President by the congressional acts. * * * We know, as a matter of public information, that the construction there given as to what was intended by Congress should be done has in fact been done. The railroad companies have been entirely excluded from participation in the operation of their properties. They receive none of the income from them. It goes to the Government. They have no voice in the employment and discharge of men engaged in the upkeep and repair of their roads and rolling stock, and the operation of trains. All of their properties, of every kind, needful for transportation purposes have been taken over by the Government, and their possession and operation rest in the exclusive control of the Director General."

Further, on page 954, the court says:

> "*Certainly there is no power in Congress to make A liable and suable for the acts of B. Fundamental principles of justice cannot be overturned by legislative fiat, to say nothing of constitutional guarantees.* Non-liability of the company was sustained at *nisi prius* in *Schumacher vs. Pennsylvania R. R. Co.*, 175 N. Y. Supp., 84. The construction of the act there given is in accord with that in the *Dakota* case, and the reasoning on which the conclusion was reached appears to me sound." (Italics added.)

In *Haubert vs. Baltimore & Ohio R. Co.*, 259 Fed., 361, it is said:

> "It is now conclusively settled that complete possession and control of all such railway lines as are under Federal control, and not a divided possession and control, have been transferred to the United States by virtue of the act of August 29, 1916 (Comp. Stat., sec. 1974*a*), the proclamation of the President

of December 26, 1917 (Comp. Stat., 1918, sec. 1974*a*), the act of March 21, 1918 (Comp. Stat., 1918, sec. 3115¾*a*, and following sections), and the President's proclamation of March 29, 1918. It seems equally clear that *all liability for all actions of the Director General of Railroads during Federal control is imposed upon the United States, and does not remain upon the railroad company*, which has thus been entirely ousted from the possession, control and operation of its property.

"All moneys and other property derived from the operation of railway lines under Federal control are the property of the United States.

* * * * * * *

"Manifestly it seems to me that in view of these conditions *no liability exists against the railroad company itself for a personal injury due to operation under Federal control*, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom." (Italics added.)

And on page 364:

"My conclusion is that *liabilities due to operation by the agencies having possession by virtue of the acts creating and authorizing Federal control are not liabilities of the railroad companies that have been ousted from such possession and control, that suits cannot be brought against such companies and prosecuted to judgment against them*, and that such claimants are limited to a right of action against the Federal control agency and to such sources of payment as are provided by the Federal Control Act." (Italics added.)

Again, in *Nash vs. Southern Pacific Company*, 260 Fed., 280, we find, quoting from page 284:

"As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession

and control of the systems of transportation taken over in whole or in part by the President was to be an *exclusive one, to no extent shared in by the owners.* If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the Government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the Government. Such a taking involved in no sense the element of agency by the Government for the owners. Agency implies a consentual or contractual relation, but this was not such. It was more nearly analogous or akin to a *taking* by the sovereign *in the right of eminent domain;* and *the result of such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation,* and quite as necessarily an assumption of such responsibility by the Government." (Italics added.)

And on page 287:

"But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, the owners could be in no way responsible—may not for a moment be indulged; such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress."

Finally, in *Westbrook vs. Director General,* 263 Fed., 211, it is said:

"The effect of the President's action and this act was not to take over the corporate owners of the transportation systems or their franchises, but only their properties. *Postal Telegraph Co. vs. Call,* 255 Fed.,

850; — C. C. A., —. The persons who had been officers and employes of the owning companies ceased in general to be such and became agents and employes of the Director General. Service of process upon them no longer bound their former employers. *Southern Cotton Oil Co. vs. A. C. L. R. R. Co.* (D. C.), 257 Fed., 138; *Wood vs. Clyde S. S. Co.* (D. C.), 257 Fed., 879. The Federal control was exclusive and complete. *Northern Pacific Railroad Co. vs. North Dakota*, 250 U. S., 135; 39 Sup. Ct., 502; 63 L. Ed., 897. Plainly, therefore, railroad operations became those of the United States, no matter in whose name carried on. They were for months carried on over each line of railroad in the name of its owner, but these names were all aliases of the United States. The inevitable confusion of names with rights occurred, and the Director General issued his General Orders 50 and 50*a*, directing suits to be brought against his official title, and providing, perhaps unnecessarily, for service on his agents.

"Since the owning companies could no longer control, the railroad officials and employes were not their agents, and *the companies could not be held for their acts. Brady vs. C. & G. W. R. R. Co.*, 114 Fed., 100, 105, 107; 52 C. C. A., 48; 57 L. R. A., 712. The United States owned what was earned, and they alone could be treated as the business operator of each railroad." (Italics added.)

In the case of *Erie R. Co. et al. vs. Caldwell*, 264 Fed., 947, which was a joint suit against the railroad company and the Director General, the railroad company moved for a directed verdict in its favor at the close of the evidence, which motion was refused. On writ of error, the Circuit Court of Appeals reversed the ruling, saying:

"The trial court should have sustained this motion and dismissed the Erie Railroad Company from the suit. *The Director General of Railroads having lawfully taken full possession and control of this company's property, the company itself could not be held liable for negligence resulting in injury to employees*

or others during the time its property was being operated by governmental agencies over which it had no control." (Italics added.)

Our research discloses only two cases asserting the right to sue and recover against the wire corporations on causes of action accruing during the period of Federal control, viz: *Witherspoon vs. Postal Telegraph, etc., Co.*, 257 Fed., 758, and *Spring vs. American Telegraph, etc., Co.* (W. Va.), 103 S. E., 206.

The *Witherspoon* case was a suit for damages for delay in delivering a cablegram. The court recited that the President's proclamation directed that the corporation's employees should continue the operation of the lines in the usual way in the names of the owners or managers, as the case might be, and admitted that neither in the joint resolution nor the proclamation of the President was there a provision similar to section 10 of the act of March 21, 1918, taking over the railroad systems of the country, but said:

> "It seems to me, however, that it was the intention of Congress, in authorizing the President to take over the lines, that the companies should go ahead with private business the same as theretofore. This would contemplate the institution and defense of suits. If the company is allowed to take and send private messages, there should be some method of holding it liable for damages occasioned through negligence, notwithstanding the Postmaster General had the direction and control of the company. See *Postal Tel. & Cable Co. vs. Call*, Dist. Judge, 255 Fed., 850. — C. C. A., —.
>
> "The joint resolution provides for just compensation to the companies and the method of settling disputes as to same between them and the Government. If the companies are held for damages occasioned while under Government control, compensation will certainly extend to reimbursement. In the meantime litigants should not be delayed in liquidating their claims. Therefore I think it proper that the plaintiff

> in this case should be allowed to establish his liability against the company, if there is any. Delay in the trial of the case may result in hardship to either side."

At the outset, we direct the court's attention to the fact that the case relied on, *Postal Telegraph-Cable Company vs. Call*, 255 Fed., 850, in no way supports the conclusion reached. That case was an application for a mandamus against a United States district judge to require him to hear and determine a controversy between a telegraph company and a railroad company for the condemnation of a right of way for a telegraph line upon and along the right of way of such railroad company, the condemnation proceeding having arisen subsequent to Federal control. The Circuit Court of Appeals for the Fifth Circuit directed the mandamus to issue. In the course of its opinion, the court expressed the view that under section 10 of the Federal control act, a plaintiff had a right to recover a judgment against a carrier company. This construction was subsequently distinctly repudiated by the action of the Director General in promulgating General Orders 50 and 50*a* and, as shall be later shown in this brief, it leaves out of view entirely the constitutional objection to giving such meaning to the act. But aside from all this, section 10 *did make provision for suit*, while the joint resolution contains no such authority, hence a construction based on a statute of one kind is totally inapplicable to a statute of a wholly different nature.

The opinion in the *Witherspoon case*, which, as a matter of fact, attempts no real discussion of the issues, is based on two assumptions, viz: (1) that the company accepted the message, and (2) that it was the intention of Congress in authorizing the taking over of the lines "that the companies should go ahead with private business the same as theretofore." If these premises are sound, the conclusion deduced therefrom as to the right to bring suit respecting matters involved in the business so privately conducted by the com-

panies may also be sound. But what the premises really assume is that the status existing between the wire companies and the United States by virtue of the congressional and presidential action was a "mere public supervision of an operation by private owners," and not a "complete assumption of absolute and complete possession and control" by the United States, "to the exclusion of every private interest." When this court in the *North Dakota case* and the *Dakota Central Telephone Company case* denied the theory of a supervised private control and asserted the fact of a complete, absolute, and exclusive possession and control by the United States, it swept away the entire basis of the decision, because a company that had been excluded from every vestige of control over and all participation in the operation of its system not only did not and could not accept a message for transmission, but did not and could not conduct the telegraph business. Hence, when the premises fail, the conclusion deduced therefrom must likewise fail.

This view of the value of the case as a precedent, in the light of the rulings of this court above referred to, finds judicial sanction in *Candiate vs. Western Union Tel. Co., supra*, and *Mitchell vs. Cumberland Tel. & Tel. Co. et al., supra*.

The additional deduction made by the court in the *Witherspoon case* from the provision in the joint resolution as to compensation to the companies, that the corporations whose lines were seized might be held liable for the acts of the employees of the United States, and would presumably receive reimbursement from the Government for any damages paid upon such judgments, is wholly illogical. It is settled by an unbroken current of decisions of this court, to which we shall have occasion hereinafter to refer, that the sovereign is exempt from suit, except where consent to bring such suit has been expressly granted by Congress. Therefore, if the Government itself is not suable under the joint resolution, the corporation held liable for the act of the Government's em-

ployee would have no right of action against the Government. The immunity of the Government from suit would extend equally to suit against it by the corporation which paid damages to an individual for an act of the employee of the Government in the control and operation of such corporation's property, and for the simple reason that Congress has not seen fit to grant in the joint resolution such right of suit against the Government; and if the Government be immune from suit, how could the corporation obtain reimbursement from the Government through a settlement of accounts of the Government's transaction of business on the corporation's lines? In such accounts the corporation could assert no claim against the Government not enforcible by law.

In the acts taking over and providing for the operation of the railroads, express provision, as we have seen, was made for the bringing of suits against the owner corporations; yet by administrative order fully authorized by the legislation, this provision was deliberately superseded, for the reason, as declared therein, that such corporations could not be *responsible* for the acts of the United States. But if the transportation corporations could not be held *personally responsible* for the acts of the Government where an act of Congress expressly declared they could be so held, how can the wire companies be held *personally responsible* therefor under a statute that not only does not, but, as we have seen, it was deliberately intended should not, make them so liable? Liability cannot be created by legislation by implication if it cannot exist by legislation expressly enacted; hence, we cannot have the anomaly of a right of action against the wire companies impliedly existing, notwithstanding the silence in reference thereto of the legislation authorizing the taking of their properties, and no right of action against the transportation companies, even though expressly provided for in the legislation taking over and directing the control of their properties. These considerations render further discussion of the

Witherspoon case unnecessary, as they fully demonstrate its unsoundness.

The other case *contra, Spring vs. American Telegraph & Telephone Co.*, was a suit to recover damages for an injury to plaintiff's automobile, resulting from a collision with one of defendant's motor trucks on a highway, which the complaint alleged was due to the negligence of the defendant, through its agents, in the management of the truck. The defendant demurred to the complaint on the ground that at the time of the accident its entire system was in the possession of and being operated by the United States, and hence no liability existed against it. The demurrer was overruled, and on appeal this ruling was sustained. In the course of the opinion, reference was made to the exclusiveness and completeness of Federal control of the systems as established by the *North Dakota case* and the *Dakota Central Telephone Company case*, and to the fact that predicating their rulings thereon, the courts of Arkansas, Alabama, and Texas, respectively, in *Western Union Tel. Co. vs. Davis, supra; Canidate vs. Western Union Telegraph Co., supra*, and *Western Union Tel. Co. vs. Wallace, supra*, had denied liability of the corporation for negligent delay in transmitting telegrams during such control. The court then stated that as the wrongs there complained of *grew out of transactions directly involved in Federal operation*, these decisions were perhaps sound, but that they were inapplicable to a case against the corporation for an injury inflicted by it in the use of its property during Federal control. As the facts of the instant case bring it within the class of cases directly referred to as arising out of Federal operation, and as the court refused to rule on the soundness of the cases denying the right to sue the corporation under such conditions, the *Spring case* may properly be regarded as having no application.

The case was heard on a demurrer to a complaint which alleged use of the motor truck in construction, maintenance, and repair, and the only point really decided was that there

was nothing to show that the truck was not rightfully acquired by the corporation *subsequent to the seizure of its properties* by the Government, and was not being rightfully used by it in and about its own *independent* business when the accident happened. Obviously, this is no holding that the corporation was liable for a transaction involved in Government *control and operation*, but only a holding that if the corporation, which did not cease to be an entity when the Government took over its property, afterwards acquired other property and by means of it inflicted injury while about its own independent business or while trespassing upon the domain of the United States, it would be liable therefor. It may well be that the court, in view of the fact that the proclamation took over not only the systems, but all "equipment thereof and appurtenances thereto whatsoever," and the further fact that a corporation without either business or the means of doing business would not likely be engaged in any kind of work with a motor truck for which it could be liable, was wholly unwarranted in the presumptions it indulged to save this complaint from demurrer; yet conceding that it action in this regard can be sustained, still it is no authority whatever for a recovery under the circumstances of the present case.

Neither the congressional nor the presidential action therefore, affords any warrant, either express or implied, for holding the owner wire corporations liable for the acts of the employees and agents of the United States while the systems of such corporations were in the possession and control of and being operated by the United States.

But the conclusion thus reached, that the asserted liability is not supported by anything found in either the congressional or the presidential action, does not finally dispose of this branch of the case. Indeed it has been contended, or at least assumed, in some quarters that the wire corporations being common carriers existing and operating by virtue of State laws at the time the United States commandeered the

properties, owed such a duty to the public of the States in which they existed and operated that they could not be rendered exempt by any action of Congress and the President from liability to the public for the acts of the Government of the United States while such Government possessed, controlled, and operated their systems. Predicating the argument on this supposed absolute duty and responsibility to the public inherent in the very nature and constitution of a common carrier, it is reasoned that the relation between a wire corporation and the United States resulting from the taking over of its properties was that of lessor and lessee, principal and agent, or something similar, and that in any event the liability of the corporation for the acts of the United States is absolute. This was the view of the learned trial judge in the court below, as will be seen by reference both to his reasons given for refusing to direct a verdict and to his charge to the jury (Transcript, pp. 52-53). The unsoundness of these views can best be demonstrated by first considering the basis on which they rest, viz: the supposed absolute duty of a common carrier as a State corporation to render at its own responsibility service to the public and the asserted want of Federal power to alter or interfere therewith; for if this be unsound all the deductions made therefrom are likewise unsound.

We freely concede that both telegraph and telephone companies are common carriers, having been expressly made so by section 1 of the Interstate Commerce act as amended by the act of Congress of June 18, 1910 (36 Stat. at L., 544). We further concede that when a telegraph company is chartered by a State or being chartered is authorized to do business therein, and it actually engages in such business, it, as a common carrier, owes a duty to render adequate and prompt service to the public without discrimination, and public policy forbids that it be allowed to divest itself of its responsibility in this regard created by virtue of its franchise, and shift it either to its lessee or to its agent. But while

such is the measure of the responsibility of a telegraph company as a common carrier and the extent of its powers in respect to actions taken of its *own volition*, yet it must be quite obvious that they have no application where the common-law duty and the corresponding common-law liability are not sought to be either evaded or avoided by the *voluntary* act of the common carrier, but have both been either displaced or suspended for the time being by the action of the United States as the paramount sovereign exerting its constitutional powers in time of war.

To assert that the obligations and responsibilities of a common carrier so inseparably inhere in its very being that the power of the United States is not such as to reach to and suspend or supplant them is but to deny the supremacy of the United States over these agencies created by State action. But under article 1, section 8, of the Constitution, Congress is not only given the power "to declare war" and "to raise and support armies," but also "to make all laws which shall be necessary and proper for carrying into execution" these powers. Hence, during the existence of war, Congress, under the Constitution, possesses plenary power to use in the common defense the entire resources of the nation, both of men and materials, and no State possesses the authority to create an entity and impose upon it such duties and obligations as to place its properties beyond the reach of this constitutional war power of the United States. But if the United States exerts the power to reach out and seize, *in invitum*, the system of any common carrier corporation created and existing by virtue of State law, and to use it in the national defense, necessarily by such exertion it reaches to, and suspends and supplants for the time being, the duties and obligations owed by such common carrier to the public, for it is inconceivable that these should still subsist when all ability to discharge them has been taken away under paramount authority.

These conclusions are fully vindicated by the decisions of

this court. Thus, in the separate opinion of Chief Justice Chase in *Ex parte Milligan*, 4 Wall., 2 (18 L. Ed., 281), it is said:

> "Congress has the power, not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief. * * *
>
> "The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise."

Again, in the *Legal Tender Cases*, 12 Wall., 457 (20 L. Ed., 287):

> "It is absolutely essential to independent national existence that government should have a firm hold on the two great sovereign instrumentalities of the sword and the purse, and the right to wield them without restriction on occasions of national peril. In certain emergencies government must have at its command, not only the personal services—the bodies and lives—of its citizens, but the lesser, though not less essential, *power of absolute control over the resources of the country*. Its armies must be filled, and its navies manned, by the citizens in person. Its material of war, its munitions, equipment, and commissary stores, must come from the industry of the country." (Italics added.)

Virtually this same denial of national power to displace State authority respecting the duties and responsibilities of common carriers was made in all of the cases involving the right of the United States, while possessing and operating

their systems, to make and enforce intrastate rates, and was conclusively answered by the unanimous judgment pronounced by this court in the *North Dakota case, supra*. There it was argued that since State control over rates was the rule prior to Federal control, the statute must be interpreted in the light of a presumption that no change in State control had been made. Answering such contention, this court said:

> "The presumption in question but denied the power exerted in the adoption of the statute, and displaced by an imaginary the dominant presumption which arose by operation of the Constitution as an inevitable effect of the adoption of the statute, as shown by the following:
>
> "(*a*) The complete and undivided character of the war power of the United States is not disputable. *Selective Draft Law cases* (*Arver vs. United States*), 245 U. S., 366; 62 L. Ed., 352; L. R. A., 1918C, 361; 38 Sup. Ct. Rep., 159; Ann. Cas. 1918B, 856; *Ex parte Milligan*, 4 Wall., 2; 18 L. Ed., 281 *Legal Tender Cases*, 12 Wall., 457; 20 L. Ed., 287; *Stewart vs. Kahn* (*Stewart vs. Bloom*), 11 Wall., 493; 20 L. Ed., 176. On the face of the statutes it is manifest that they were in terms based upon the war power, since the authority they gave arose only because of the existence of war, and the right to exert such authority was to cease upon the war's termination. To interpret, therefore, the exercise of the power by a presumption of the continuance of a State power limiting and controlling the national authority *was but to deny its existence*. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used. *Cox vs. Wood*, 247 U. S., 3; 62 L. Ed., 947; 38 Sup. Ct. Rep., 421.
>
> "(*b*) The elementary principle that, under the Constitution, the authority of the Government of the United States is paramount when exerted as to subjects concerning which it has the power to control, is indisputable. This being true, it results that al-

though authority to regulate within a given sphere may exist in both the United States and in the States, when the former calls into play constitutional authority within such general sphere the necessary effect of doing so is, that to the extent that any conflict arises the State power is limited, since in case of conflict that which is paramount necessarily controls that which is subordinate.

"Again, as the power which was exerted was supreme, to interpret it upon the basis that its exercise must be presumed to be limited was to deny the power itself. Thus, once more it comes to pass that *the application of the assumed presumption was in effect but a form of expression by which the power which Congress had exerted was denied.* In fact, error arising from indulging in such erroneous presumption permeates every contention." (Italics added.)

To the same effect are:

Selective Draft Law cases, 245 U. S., 366 (62 L. Ed., 349).

Cox vs. Wood, 247 U. S., 3 (62 L. Ed., 947).

Dakota Central Telephone Co. vs. South Dakota ex rel. Payne, 250 U. S., 163 (63 L. Ed., 910).

Commercial Cable Co. vs. Burleson, 255 Fed., 99.

Southwestern Tel., etc., Co. vs. Houston, 256 Fed., 690.

Castle vs. Southern R. Co., 112 S. C., 407; 99 S. E. 846.

As illustrative of the efforts in some jurisdictions to hold the transportation companies liable on this theory of their absolute and inherent duties to the public as common carriers, attention is directed to three recent cases in the Supreme Court of North Carolina, viz: *Hill vs. Director General*, 178 N. C., 607; 101 S. E., 376; *Clements vs. Southern R. Co.*, 179 N. C., —; 102 S. E., 399, and *Gilliam vs. Atlantic Coast Line Railroad Co.*, 103 S. E., 10.

In the *Hill* case the railroad company and the Director

General were sued jointly, and it was held that a cause of action was stated against the corporation *alone* and that the Director General was "only a party as having control and management of the defendant road sued." The ground of the ruling was based on the assertion that as the lessor the carrier was liable for the acts of its lessee, the United States.

The *Clements case*, which was also a suit against the railroad company and the Director General, held that under section 10 of the Federal control act of March 21, 1918, the corporation was liable to be sued, that the Director General was "to be considered a party only as being in the management and control of the defendant railroad," and that the Director General was "simply in effect a statutory receiver appointed by the President under authority of the act of Congress." It was further held that by the contract concluded between the railroad company and the United States, the status of lessor and lessee was created, with consequent liability to the railroad as lessor for the lessee's acts.

The *Gilliam* case was likewise a joint suit against the railroad company and the Director General, and the court went so far as to hold the railroad system was not seized by the Government *in invitum*, but was taken over *by contract*, and that under such contract the railroad lessor was liable for the acts of its lessee.

Two of these cases, *Hill* and *Clements*, assert that the Director General had merely succeeded to the management and control of *the defendant railroad corporation*, and therefore he was merely a nominal defendant on the record. This is but a restatement in different form of the fallacy underlying all the cases affirming liability of the corporation for the acts of the United States, namely, the assertion of mere Federal supervision of an operation by the owner corporations as distinguished from an absolute, complete and exclusive assumption of possession and control of the *properties* of such corporations and the operation of such properties by the agents

of the Government *to the complete exclusion of the corporations.* Under the principles adjudicated by this court in the *North Dakota case* and the *Dakota Central Telephone Company case*, the Director General never was for a moment in the control and management of the defendant railroad company, but was *only in the control and management of its property.* It is quite true, the corporation did not, by the congressional and presidential action, cease to exist as a separate entity, but it is equally true that it ceased to function as a common carrier. Thus in *Rutherford vs. Union Pacific Railroad Company*, 254 Fed., 880, it is said:

> "From and after the taking of possession of the railroads by the President, *the corporations or persons who had previously controlled them ceased their functions and obligations as carriers.* While goods and passengers continued to be carried, the carriage was conducted by the Director General. The acts of the former officers and employees who retained their positions and conducted the details of operation were the acts of the Director General." (Italics added.)

Again, in *Nash vs. Southern Pacific Company*, 260 Fed., 280, we find:

> "What was authorized by this legislation to be taken under Federal control was specific property—that is, *solely the transportation systems of the country*—and that was all the proclamations of the President *assumed to take into his control. The corporations owning these properties were not taken;* they were left untouched and free to continue their functions as such in all respects other than in the operation of their carrier systems." (Italics added.)

Hence the ground first asserted as a basis of liability on the part of the carrier corporation must fail.

Nor is there any more of merit in the ground that the status between carrier corporations and the United States, resulting from the congressional and presidential action, was

in effect a lease by the corporations to the United States and that on common-law principles governing common carriers the corporation lessors are liable.

No question is or can be made as to the want of power in a common carrier to relieve itself of its duties and liabilities to the public, for as said by this court in *Washington, etc., R. Co. vs. Brown*, 17 Wall., 445 (21 L. Ed., 675):

> "It is the accepted doctrine in this country that a railroad corporation" (and we may add, any common carrier) "cannot escape the performance of any duty or obligation imposed by its charter or the general laws of the State by a voluntary surrender of its road into the hands of lessees. The operation of the road by the lessees does not change the relations of the original company to the public."

The cases are collated in:

5 R. C. L., p. 59.
10 C. J., 881.

In the *Gilliam* case the court declared that, "with very few exceptions, the control and management of the various railroads in this country were *acquired* by an *actual lease* from *each company*," which was a palpably incorrect statement, as every court should take judicial notice of the fact that the systems of both the transportation companies and the wire companies were *first actually* seized and taken over by the United States and *thereafter contracts providing for compensation*, not voluntary leases, were entered into between the companies and the United States. This was expressly ruled by this court in the *Dakota Central Telephone Company case, supra*. Disposing of the same contention the Circuit Court of Appeals for the Second Circuit in *Krichman vs. United States*, 263 Fed., 538, said:

> *"The claim that the railroads were taken over in pursuance of contracts made by the Director General of Railroads is not borne out by the facts. The con-*

tracts were merely agreements for compensation made under the Federal control act of March 21, 1918." (Italics added.)

But the principle upon which a lessor carrier corporation is held liable for the acts of its lessee is that in accepting a charter such carrier assumes the performance of all duties to the public imposed upon it by the charter or the general laws of the State, and it cannot, consistently with public policy, be permitted to absolve itself from such duties by *voluntarily* transferring its chartered rights and privileges to another, in the absence of statutory authority so to do.

Washington, etc., R. Co. vs. Brown, supra.

Central Trust Co. vs. Charlotte, etc., R. Co., 65 Fed., 257.

Reed vs. Southern R. Co., 75 S. C., 162, and cases cited.

It is thus apparent that this inability of the common carrier only obtains when its action is *voluntary* and does not exist when the transfer is either (1) *involuntary*, or (2) *made under legislative authority*. In the instant case, however, the telegraph company had no choice whatever in the matter, for its property was seized *in invitum* by, and it was compelled to contract in regard to compensation therefor, willingly or unwillingly, with the sovereign Government of the United States, an authority paramount to the State from which the carrier received its franchises, and which in thus acting was but exerting its constitutional power to utilize the material resources of the country in a time of national peril. This predicating of carrier liability on a supposed relation of lessor and lessee created between the carrier and the Government, as was so well pointed out by this court in disposing of a similar contention in *Northern Pacific Railroad Co. vs. North Dakota ex rel. Langer*, and *Dakota Central Telephone Co. vs. South Dakota ex rel. Payne, supra*, is but an-

other way of asserting that the authority of the United States in taking over the transportation, telegraph and telephone lines was not exclusive and unlimited, but that State control existed to the same extent and over the same matters as had existed prior to the assumption of control by the Federal Government. As was stated by the Chief Justice in the *North Dakota case*, this erroneous assumption of continued State control permeated every contention made in that case, as well as in the *Dakota Central Telephone case*; and the court held that the control, possession and operation by the United States was complete and exclusive and free from any limitation or restriction whatever by the States. The conclusion so reached in these cases is utterly incompatible with any idea of liability on the part of the corporation for the acts of the Government committed in its sovereign capacity.

If the relation between the United States and the telegraph company was merely that of lessor and lessee, or principal and agent, this would be a simple question of contract and the authority of the United States as the lessee or agent would be wholly derivative and could rise no higher than its source, namely, the will of its lessor or principal. Assuming such to be the relation between the Government and the telegraph company, it is manifest that such contract could have been terminated by the lessor or principal at any time, and if improperly terminated the only redress left to the United States would have been an action for damages. In other words, the application to the relation between the parties of the rules applying to ordinary contracts between lessor and lessee, or principal and agent, would have left it wholly within the power of the telegraph company to destroy at any time the Government's control and operation thereof. But, as has been seen, this was not the relation between the United States and the company. On the contrary, the United States, acting under the supreme and paramount war power created by the Federal Constitution and called into play by the act of Congress, assumed a complete and exclusive supervision, pos-

session, control and operation of the telegraph companies' systems, which could not be in any way affected or interfered with by such telegraph companies, not only for the duration of the war but until "the date of the proclamation by the President of the exchange of ratifications of the treaty of peace."

In the case of *Commercial Cable Company vs. Burleson*, 255 Fed., 99, the cable company questioned the authority of the President to take the supervision, possession, control and operation of its lines, but this contention was denied, the court saying that under the war powers granted to the President, he had the right to *condemn*, as it were, the property of the cable company for the use of the Government in prosecuting the war to a successful conclusion.

And in *Nash vs. Southern Pacific Co.*, 260 Fed., 280, we find this statement:

> "As the terms of the act at once disclose, it was the purpose and intent of Congress that the possession and control of the systems of transportation taken over in whole or in part by the President was to be an exclusive one, to no extent shared in by the owners. If the latter or their officers were retained as operators, they were to act merely as servants and under pay of the Government; and while the owners were to be compensated for the use of their properties, everything earned or accruing from their operation in excess of such compensation was to be the property of the Government. *Such a taking involved in no sense the element of agency by the Government for the owners.* Agency implies a consentual or contractual relation, but this was not such. *It was more nearly analogous or akin to a taking by the sovereign in the right of eminent domain; and the result of such a taking was necessarily to relieve the owners of systems so taken from any legal responsibility to the public arising out of their operation*, and quite as necessarily an assumption of such responsibility by the Government." (Italics added.)

In other words, the act of the United States in taking over the telegraph systems to be used as governmental agencies in the prosecution of the war was in effect a *condemnation* of such systems to the uses of the United States for the period of the emergency, and the contracts subsequently entered into between it and the various companies were but methods of making the compensation required by the act authorizing the condemnation.

Crozier vs. Krupp, 224 U. S., 290 (56 L. Ed., 771).
Dakota Central Telephone Co. vs. South Dakota ex rel. Payne, supra.
Krichman vs. United States, supra.

From these considerations it inevitably results that no relationship of lessor and lessee existed, and hence no liability can be placed on this ground.

It is next in order to examine the proposition that liability can be based either on a relationship of principal and agent existing between the carrier corporation and the United States or on a relationship of master and servant existing between such corporation and the agents and employees of the United States in the management of the business.

Respecting the contention that the Government, in its control and operation of the systems, was acting merely as the agent of the companies we find in *Schumacher vs. Pennsylvania R. Co.*, 106 N. Y. Misc., 564, 175 N. Y. Supp., 84, this statement:

> "The Federal Government, in the control and operation of the railroad properties taken over, is in no sense the agent or representative of the railroad companies to whom the systems belong. * * * The Federal Government, in the operation of the systems taken over, acts as the principal and not as the agent of the owners of the transportation system."

And in *Mardis vs. Hines*, 258 Fed., 945, the court declares in reference to the alleged relation of master and servant:

> "From the time that the proclamation of the President became effective on December 28, 1917, the Director General as the representative of the President has been in the exclusive possession and control of the railroad. The railroad company exercises no control whatever. The railroad is operated under the orders of the Director General. The railroad company has nothing to do with such operation. When the Director General assumed control all the employees on the railroad ceased to be employees of the railroad company and became employees of the Director General. *At that time the relation of master and servant ceased to exist between the employees operating the railroad and the railroad company.* That relation then began and still exists between such employees and the Director General." (Italics added.)

Again, in *Southern Cotton Oil Co. vs. Atlantic Coast Line R. Co.*, 257 Fed., 138, it is said:

> "When the Director General assumed control, the acts of the former officers and employees, who retained their positions and conducted the details of operation of the railroads, were the acts of the Director General. *Rutherford vs. Union Pac. R. Co.* (D. C.), 254 Fed., 880. *Their employment by the Director General made them exclusively the servants or agents of the employer. There could be no divided allegiance as agents of the railroad corporation and of the Director General*, so as to accomplish the purpose of Congress. The acts of Congress, the proclamation of the President, and the general orders of the Director General *neither expressly nor by implication contemplated a dual agency of employees engaged in the operation of the railroads.*" (Italics added.)

All of these rulings are fully supported by the decisions in:

Railroad Commissioners vs. Burleson, 255 Fed., 604.

Hatcher & Snyder vs. Atchison, etc., R. Co., 258 Fed., 952.

Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.

Canidate vs. Western Union Tel. Co. (Ala.), *supra*.

Western Union Tel. Co. vs. Wallace (Tex.), *supra*.

Western Union Tel. Co. vs. Glover (Ala.), *supra*.

Western Union Tel. Co. vs. Davis (Ark.), *supra*.

But whether the relationship of principal and agent, or of master and servant, exists in a given case is always to be determined "by ascertaining who has *the power to control and direct*" the agent or servant in the performance of the work. *Standard Oil Company vs. Anderson*, 212 U. S., 215 (53 L. Ed., 480). Or, as said by Judge Sanborn in delivering the opinion of the Circuit Court of Appeals in *Brady vs. Chicago, etc., R. Co.*, 114 Fed., 100; 57 L. R. A., 712:

> "*The power of control is the test of liability*, under the maxim *respondeat superior*. If the master cannot command the alleged servant, then the acts of the latter are not his, and he is not responsible for them. If the principal cannot control and direct the alleged agent, then he is not his agent, and the principal is not liable for his acts or his omissions. In such case the maxim *respondeat superior* has no application, because there is no superior to respond. In an action against an alleged master or principal for the act of his alleged servant or agent under the maxim *respondeat superior*, there can be no recovery in the absence of the right and power in the former to command or direct the latter in the performance of the act charged because in such a case there is no superior to answer." (Italics added.)

The same principle has been stated and applied by this court in the following cases:

New Orleans, etc., R. Co. vs. Hanning, 15 Wall., 649 (21 L. Ed., 220).

Singer Mfg. Co. vs. Rahn, 132 U. S., 518 (33 L. Ed., 440).

Chicago, etc., R. Co. vs. Bond, 240 U. S., 449 (60 L. Ed., 735).

That neither the wire corporations nor their officers had any power whatever to control either the operation and management of the systems or any of the agents or employees engaged in such operation and management was strikingly illustrated by the action of the Postmaster General in connection with the control of the cable lines of the Commercial Cable Company.

On November 2, 1918, the President, pursuant to the joint resolution of July 16, 1918, issued a proclamation by which he took possession and assumed control of all of the marine cable systems, this proclamation being practically identical with that by which he assumed possession and control of the land lines. Thereafter, just as in the case of the land lines, the Postmaster General issued an order directing the officers, operators and employees of the cable companies to continue in the performance of their existing duties until further notice. Subsequent to the issuance of this order, the Postmaster General, acting on behalf of the United States, decided to effect a "unification in operation" of the cable systems under one management, and in order to carry out such unification, directed that Mr. George G. Ward, vice-president of the Commercial Cable Company, and the operating head of such company, assume the management and operation of the systems. The officers of the Commercial Cable Company refused to acquiesce in the directions of the Postmaster General, and by Order No. 2474, issued December 12, 1918, the Postmaster General excluded Clarence H. Mackay, George G. Ward, and William W. Cook, official heads of the Commercial Cable Company, "from any connection with the supervision, possession, control or operation of any and all marine

cable systems or any part thereof, the supervision, possession, control and operation of which was taken over and assumed by the President," and directed an officer of an entirely different company to assume the management and operation of all the marine cable systems. This order will be found set out in full as Exhibit "B" in the appendix hereto.

If the officers of the telegraph company, who had been continued in the service during the operation of its lines by the United States, had refused to carry out any similar orders of the Postmaster General, they would have been removed in the same manner as were these officers of the cable company. But if the United States had the right not only to remove them from its service, but, in addition, to exclude them from any connection with the "supervision, possession, control or operation" of the systems, clearly neither the corporation nor the officers thereof, through whom it must necessarily act, had any power whatever to control the actions of the United States or those of its agents, servants and employees. From this it results necessarily that there was no power of control on the part of the corporation or its officers, and hence nothing upon which to base liability.

It must therefore follow, under the facts as they exist, in the light of the legal principles to which we have adverted, that any case that holds a carrier corporation liable for the acts of the United States during the possession, control, and operation of its property by the United States, on the theory of a relationship of principal and agent existing between such corporation and the United States, or a relationship of master and servant existing between such corporation and the agents and employees of the United States, is without foundation in fact and without authority in law.

In the *Clements case*, however, the North Carolina court asserted that the Director General was "simply in effect a statutory receiver," and from this drew the deduction that as such he was "to be considered a party only as being in the management and control of the defendant railroad." This

so-called "statutory receiver" was then treated by the court as a merely nominal defendant, and liability was adjudged against the corporation.

The analogy between the Director General or Postmaster General and a receiver, which seems to have been first suggested in *Rutherford vs. Union Pacific R. Co.*, 254 Fed., 880, is, however, by no means perfect; the principal difference being in the case of the Director General or Postmaster General, the enforced taking of all the property of the corporation at an enforced rental and an appropriation by the sovereign taker *to its own use* of all revenues derived by it from its operation thereof, and in the case of the receiver, the taking over of the corporate business and affairs into the custody of the court and there managing them for the *sole benefit of the corporation and its creditors.*

But we concede there is sufficient analogy between the two cases to make directly applicable to corporations whose properties are in the hands of the Director General or of the Postmaster General, as the case may be, the rule administered by this and the lower Federal courts as to the *personal* liability of the corporation for the acts of its receiver when by the receivership it has been divested of all control over both its property and those who operate it, under which rule the result in the *Clements case* was entirely unwarranted.

In a recent text work, 23 R. C. L., p. 51, title Receivers, sec. 54, the rule is thus tersely and accurately stated:

> "The authorities agree that, in the absence of any absolute liability created by statute, a railroad company whose road, with all its appurtenances, is in the exclusive possession, use, and control of a receiver who has power to employ, control, and dismiss all the agents, servants, and employees engaged in its operation, is not liable for injuries resulting from the negligence of the agents and servants of the receiver operating the road. The company, under such circumstances, has no power to control either the receiver or his employees. His possession is not that of the

company, but is antagonistic thereto. But the company is not relieved from liability, unless the possession of the receiver is exclusive and the servants of the road are wholly employed and controlled by him."

This court, in *Washington, etc., R. Co. vs. Brown*, 17 Wall., 445 (21 L. Ed., 675), stated the law in these words:

"The operation of the road by the lessees does not change the relations of the original company to the public. It is argued, however, that this rule is not applicable where the proceeding, instead of being voluntary, is compulsory, as in the case of the transfer of possession to a receiver by a decree of a court of competent jurisdiction. Whether this be so or not, we are not called upon to decide, because *it has never been held that the company is relieved from liability, unless the possession of the receiver is exclusive and the servants of the road wholly employed and controlled by him*. In this case the possession was not exclusive, nor were the servants subject to the receiver's order alone. On the contrary, the road was run on the joint account of the lessees and receiver, and the servants employed and controlled by them jointly. Both were, therefore, alike responsible for the act complained of, and if so, the original company is also responsible, for the servants under such an employment, in legal contemplation, are as much the servants of the company as of the lessees and receiver." (Italics added.)

And Judge Lurton, in delivering the unanimous opinion of the Circuit Court of Appeals for the Sixth Circuit, in *Memphis, etc., R. Co. vs. Hoechner*, 67 Fed., 456, said:

"The receivers, as such, are liable for their negligent acts. Both to the public and to employees they stand responsible to the full extent of the earnings resulting from their management, and, under some circumstances, the property itself may constitute a fund which may be reached and subjected by those sustaining injuries. *But we know of no legal principle*

which would justify a court in holding a corporation, which is excluded from all control and management, responsible for the torts of such receivers, or for the negligent acts of their servants. The relation of master and servant does not exist between the excluded corporation and the servants of the receivers. If the possession of the receivers be exclusive, as was the case under the decree appointing McGhee and Fink, *the corporation can neither employ, discharge nor control such servants; and it would be a gross injustice to say that, under such circumstances, it should be liable for the conduct of servants which it neither employed nor controlled.*

"In High on Receivers the rule is thus stated:

" 'Since the *receivers* of a railway *who are vested with its absolute control and management* are thus liable for injuries resulting from negligence in operating the road to the same extent that the company might have been liable, *it would seem to be clear, upon principle and in the absence of any absolute liability created by statute, that the corporation itself cannot be held responsible for the negligence of servants of a receiver operating the road. The receiver's possession is not the possession of the corporation, but is antagonistic thereto, and the company cannot control either the receiver or his employees.*' High. Rec., sec. 396.

"This is in accord with the doctrine as stated by other text writers of repute: Rorer, R. R., p. 896; Jones, Ry. Secur., p. 285; Patt. Ry. Acc. Law, sec. 134; Wood, R. R., secs. 385-482. The direct question has not often arisen for decision, but, when it has, the courts have almost uniformly announced the doctrine we have stated. *Metz vs. Railroad Co.*, 58 N. Y., 66; *Turner vs. Railroad Co.*, 74 Mo., 604; *State vs. Wabash Ry. Co.*, 115 Ind., 466; 17 N. E., 909; *Godfrey vs. Railroad Co.*, 116 Ind., 30; 18 N. E., 61; *Railroad Co. vs. Stringfellow*, 44 Ark., 322; *Railway Co. vs. Dorough*, 72 Tex., 111; 10 S. W., 711; *Meara vs. Holbrook*, 20 Ohio St., 145, 146; *Thurman vs. Railroad Co.*, 56 Ga., 376; *Davis vs. Duncan*, 19 Fed., 477. The principle upon which the doctrine rests is

that applicable to the liability of the lessor for the torts of the lessee company when the lease is authorized by law. *Arrowsmith vs. Railroad Co.*, 57 Fed., 178; *Byrne vs. Railroad Co.*, 9 C. C. A., 666; 61 Fed., 605. When the possession or control is in fact a joint one, the rule is otherwise, for the obvious reason that the servants are the joint servants of two masters, and each would be liable. But the cases making this distinction recognize the general rule to be as we have stated it. The nonliability of the corporation depends upon the control being really and exclusively in the receivers. *Railroad Co. vs. Brown*, 17 Wall., 445-450; *Railroad vs. Jones*, 155 U. S., 354; 15 Sup. Ct., 136; *Railway Co. vs. Johnson*, 76 Tex., 421; 13 S. W., 463." (Italics added.)

To the same effect are:

Pennsylvania R. Co. vs. Jones, 155 U. S., 333 (39 L. Ed., 176).

Landers vs. Felton, 73 Fed., 311.

Gableman vs. Peoria, etc., R. Co., 82 Fed., 790.

Baltimore & Ohio R. Co. vs. Burris, 111 Fed., 882.

Judge Lurton, in the quotation above made, has stated the precise condition obtaining, according to all the decided cases to which we have referred, between the United States and these carrier corporations whose properties were taken over, and if exclusion from all control and management of the property, and all right to direct, employ, discharge, or control the servants, during a receivership, will render a corporation immune from suit on causes of action arising out of the receiver's possession and operation, *a fortiori*, similar exclusion will render these corporations immune from suits on causes of action arising out of the possession and operation of their properties by the United States through the Director General of Railroads or the Postmaster General.

So that from a critical analysis of the facts, and the application thereto of the controlling principles of law laid down

by this and other courts, we are forced to conclude that neither anything, express or implied, in the joint resolution of Congress or the proclamation of the President, nor any principle of the law governing common carriers, renders the owner corporation liable for the acts of the United States not performed in its behalf, or under its direction, control, or authority, or for its benefit, and as to which it has no relation of principal, master, or beneficiary, or in which it in no way participates.

As was well said in the recent case of *Blevins vs. Hines*, 264 Fed., 1005:

> "On common-law principles, it goes without saying that the carrier is not in the least degree responsible for the injury, has no interest in the controversy, and hence is not properly joined as a defendant."

It therefore follows that the telegraph company having been entirely eliminated from both the possession and operation of the property, and the United States being in absolute control and dominion, even though exercising such control through individuals who had been officers and agents of the company but who had become agents of the United States, this suit is no more maintainable against it than it would be against any other outside or disinterested person.

II.

FEDERAL POSSESSION, CONTROL, AND OPERATION OF THE TELEGRAPH SYSTEMS, AND LIABILITY OF THE UNITED STATES THEREUNDER.

Under this head we consider these three propositions:

1. The acts and omissions complained of in the present case were those of the United States, and not those of the telegraph company; hence the United States is the real party in interest.

2. The United States being the real party in interest, authority to bring and maintain this suit indirectly against the United States must be found in an act of Congress or it does not exist.

3. The judgment herein is ineffective against the United States, and, if effective at all, is effective solely against the telegraph company.

These will now be considered in the order stated.

1. **The acts and omissions complained of in the present case were those of the United States, and not those of the telegraph company, hence the United States is the real party in interest.**

Federal possession, control, and operation of the telegraph systems commenced August 1, 1918, and ended August 1, 1919 (Act of July 11, 1919, 41 Stat. L., 157). The transactions out of which this suit arises were had on the 2d and 3d days of October, 1918 (Transcript, pp. 2-3), hence they obviously fall within such period of Federal possession, control, and operation. The three telegrams, involved were, respectively, (1) a request for an offer on the cotton, (2) an actual offer, and (3) an acceptance of the offer, and the contracts for the transmission and delivery of the first and third were entered into between Poston himself and the agent in the telegraph office at Johnsonville, while the contract relating to the second was entered into between Poston's broker and the agent in the telegraph office in Charleston; and any breach of such contracts by delay in the transmission and delivery of these telegrams whereby Poston sustained loss as alleged in his complaint resulted solely from the acts of nonfeasance or misfeasance of these and other agents and servants engaged in carrying on the telegraph business. It is true, these agents and servants prior to Federal operation may

have been agents and servants of the telegraph company, since both the proclamation of the President and order No. 1783 of the Postmaster General continued all such in the service; but when the United States assumed the absolute and complete possession, control, and operation of the telegraph system, it excluded the telegraph company from *all interest and participation therein*, and the company's former agents and servants retained in the service ceased to be the agents and servants of the telegraph company, and became *solely the agents and servants of the United States*. This conclusion results as a necessary corollary from the decisions of this court in the *Dakota Central Telephone Company case* and the *North Dakota case, supra*. It is also expressly ruled in:

Railroad Commissioners vs. Burleson, 255 Fed., 604.
Mardis vs. Hines, 258 Fed., 945.
Hatcher & Snyder vs. Atchison, etc., R. Co., 258 Fed., 952.
Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.
Southwestern Bell Tel. Co. vs. State (Okla)., 181 Pac., 487.
Canidate vs. Western Union Tel. Co., supra.
Western Union Tel. Co. vs. Wallace, supra.
Western Union Tel. Co. vs. Glover, supra.
Western Union Tel. Co. vs. Davis, 218 S. W., 833.
Mitchell vs. Cumberland Tel. Co., 221 S. W., 547.

Further than this, the joint resolution embraced and the action of the President exerted the right of the United States not only to take over the entire business, but the right of the United States to appropriate as its own property all the revenues arising from its operation thereof. So that the excluded owner corporation had no connection with the system, no control over the agents and servants, no voice in its management, no right to the revenues, all of these powers having passed to the United States under an express agreement in the statute authorizing the taking of the properties to make just compensation to the owner for the loss thereof.

This being the case, manifestly the telegraph company had no interest in the transactions which give rise to this suit, but these were solely the concern of the United States. But if this be true, then it would seem that the United States, and not the telegraph company, was the real party in interest. That such must be the result is readily demonstrable.

The determining principle in ascertaining who is the real party in interest when the suit is against officers or agents of the United States, or concerns transactions with which the United States is either connected or in some way interested has been stated by this court in *Minnesota vs. Hitchcock,* 185 U. S., 373 (46 L. Ed., 954), to be this:

> "Now, the legal title to these lands is in the United States. The officers named as defendants have no interest in the lands or the proceeds thereof. The United States is proposing to sell them. This suit seeks to restrain the United States from such sale, to divest the Government of its title and vest it in the State. The United States is, therefore, the real party affected by the judgment and against which, in fact, it will operate, and the officers have no pecuniary interest in the matter. If whether a suit is one against a State is to be determined not by the fact of the party named as defendant on the record, but *by the result of the judgment or decree which may be entered,* the same rule must apply to the United States. *The question whether the United States is a party to a controversy is not determined by the merely nominal party on the record but by the question of the effect of the judgment or decree which can be entered.*" (Italics added.)

The rule thus laid down has been approved and applied by this court in the following cases:

Oregon vs. Hitchcock, 202 U. S., 60 (50 L. Ed., 935).

Kansas vs. United States, 204 U. S., 331 (51 L. Ed., , 510).

Louisiana vs. McAdoo, 234 U. S., 627 (58 L. Ed., 1506).

Applying this test to the facts of the instant case we have this result: The action is for breach of contract made with the agents of the United States, hence the liability is that of their principal, the United States, and if this be true, the judgment recovered for such breach should be enforcible only out of the property of the United States, and particularly the income earned by it from the telegraph business. It therefore follows that while the telegraph company is named as the defendant on the record, the rights of the United States affected by the judgment are such as to make it the real party in interest. This conclusion is abundantly sustained by the decisions.

In the case of *Louisiana vs. McAdoo*, 234 U. S., 627 (58 L. Ed., 1506), the State of Louisiana, as a producer of sugar, sought leave of this court to file a petition against the Secretary and Assistant Secretary of the Treasury of the United States to review their official judgment as to the rate of duty to be exacted on importations of Cuban sugar. The United States contended in opposition that the suit was against it, and could not be maintained without its consent. Leave to file was denied, this court holding that the effect of the suit would be to "affect the revenues" of the United States, which rendered it a suit against the United States.

The case of *Wells vs. Roper*, 246 U. S., 335 (62 L. Ed., 755), was a bill in equity to enjoin the First Assistant Postmaster General from annulling a contract between the plaintiff and the Postmaster General, acting for the United States, for furnishing certain specially equipped automobiles to be used for a stated period in collecting and delivering mails in the City of Washington, and from putting into effect in lieu thereof an experimental combined screened automobile or wagon collection and delivery service, as contemplated under an act of Congress dated March 9, 1914. The bill was dismissed, this court saying:

> "The effect of the injunction asked for would have been to oblige the United States to accept continued performance of plaintiff's contract, and thus prevent the inauguration of the experimental service contemplated by the Act of 1914—*a direct interference with one of the processes of government.* * * * That the interests of the Government are so directly involved as to make the United States a *necessary* party, and therefore to be considered as in effect a party, although not named in the bill, is entirely plain." (Italics added.)

These two cases decided by this court cannot be distinguished in principle on this point from the instant case, hence they would seem to be conclusive of it.

In a number of the cases seeking to enjoin the charging and collecting during Federal control of all the carrier systems of intrastate rates other than those prescribed by State authority, the precise question has arisen and each time it has been held that the United States was the real party in interest. The court's attention is directed to a few of such cases.

In *Public Service Commission vs. New England Telephone, etc., Co.*, 232 Mass., 465; 122 N. E., 567, the plaintiff brought suit to enforce by injunction intrastate rates made pursuant to State law, and the defendant telephone company in its answer, *inter alia*, averred that the relief prayed would in effect restrain the United States. This contention of the defendant was sustained, the court holding that the case on this point was indistinguishable from *Louisiana vs. McAdoo, supra*, and *Wells vs. Roper, supra*. On writ of certiorari to this court, the decision was affirmed in *McLeod vs. New England Telephone & Telegraph Co.*, 250 U. S., 195 (63 L. Ed., —).

In *Southwestern Bell Telephone Co. vs. Oklahoma* (Okla.), 181 Pac., 487, the State brought suit to enjoin the charging of tolls in excess of those authorized by State law. The court denied the injunction, holding that the Postmaster General was an indispensable party to the action, as the ef-

fect of the decree would be "to interfere with his operation and control."

In *Railroad Commissioners vs. Cumberland Telephone, etc., Company and A. S. Burleson, Postmaster General* (La.), — South., — (not yet reported), the plaintiffs obtained an injunction in the lower court preventing the company and the Postmaster General from enforcing intrastate rates promulgated by the Postmaster General. On writ of certiorari to the State Supreme Court, the plea of the Postmaster General to the jurisdiction on the ground that the suit was against the United States was sustained, and the injunction dissolved, the court saying:

> "The suit is clearly against the Government, and the courts of the State are without jurisdiction over it."

To the same effect are the rulings in:

State of Wisconsin vs. Wisconsin Tel. Co. (Wis.), 172 N. W., 225.

Haubert vs. Baltimore & Ohio R. Co., 259 Fed., 361.

It is well settled that where, in a suit against an officer or agent of the United States, the act complained of, considered apart from the official authority alleged as its justification, is the *personal* act of such officer or agent constituting a breach of *personal* duty owed to the plaintiff, the United States is not the real party in interest, and the suit will lie against the officer or agent.

In re Ayers, 123 U. S., 443 (31 L. Ed., 216).

Roberts vs. United States, 176 U. S., 219 (44 L. Ed., 443).

Minnesota vs. Hitchcock, 185 U. S., 373 (46 L. Ed., 954).

United States ex rel. Parish vs. McVeagh, 214 U. S., 124 (53 L. Ed., 936).

Houston vs. Ormes, — U. S., — (64 L. Ed., —), decided April 19, 1920.

This principle, however, is wholly inapplicable to the present case. As this court held in the *Dakota Central Telephone Company case*, when the United States took over the wire lines and entered into the conduct of the telegraph business it was operating such business *"as a governmental agency."* The contracts for the breach of which this suit is brought were made with agents of the United States in the actual course of the operation of such governmental agency, hence the breach of duty by failing to transmit and deliver the telegrams promptly was a breach of duty by the United States as the carrier conducting the business, and not a breach of a duty owed personally by such agents to the plaintiff. The case, therefore, falls squarely within the principle announced in the leading case of *Hodgson vs. Dexter*, 1 Cranch, 345 (2 L. Ed., 130), where was involved the question of the right to maintain a suit against the Secretary of War *personally* on a lease made to him and his successors, and respecting which this court, speaking through Chief Justice Marshall, said:

> "The court is unanimously and clearly of opinion that this contract was entered into entirely on behalf of the Government, by a person properly authorized to make it, and that its obligation is on the Government only. Whatever the claims of the plaintiff may be, it is to the Government and not to the defendant he must resort to have them satisfied."

This case has been cited with approval in the following cases:

> *Garland vs. Davis*, 4 Howard, 131 (11 L. Ed., 907).
> *Belknap vs. Schild*, 161 U. S., 10 (40 L. Ed., 599).
> *District of Columbia vs. Camden Iron Works*, 181 U. S., 453 (45 L. Ed., 948).

The authorities, therefore, conclusively establish that the United States, and not the telegraph company named as de-

fendant on the record, is the real party in interest in this case.

2. The United States, being the real party in interest, authority to bring and maintain this suit indirectly against the United States must be found in an act of Congress or it does not exist.

But if, as shown, the United States, and not the defendant telegraph company, is the real party in interest, the question then arises as to the authority to bring this suit and recover indirectly against the United States.

Whatever may be the true principles on which it is founded (*U. S. vs. Lee*, 106 U. S., 196; 27 L. Ed., 171), it is a rule firmly established by an unbroken current of decisions of this court dating back to its very beginning that the United States, like all sovereigns, is exempt from suit in any court, either at law or in equity, without its consent. The rule is thus clearly stated in the leading case of *Belknap vs. Schild*, 161 U. S., 10; 40 L. Ed., 599:

> "The United States, however, like all sovereigns, cannot be impleaded in a judicial tribunal, except so far as they have consented to be sued. This doctrine has been affirmed by this court in cases too numerous to be cited, and was clearly stated by Mr. Justice Field delivering judgment in the case of *The Siren*, as follows: 'It is a familiar doctrine of the common law that the sovereign cannot be sued in his own courts, without his consent. The doctrine rests upon reasons of public policy—the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the Government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to

the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and *whoever institutes such proceedings must bring his case within the authority of some act of Congress.* Such is the language of this court in *United States vs. Clarke*, 8 Peters, 444. The same exemption from judicial process extends to the property of the United States, and for the same reasons. As justly observed by the learned judge who tried this case, *there is no distinction between suits against the Government directly and suits against its property.' The Siren*, 7 Wall., 152, 154. 'So much of this statement as regards suits against the United States or against their property was repeated by the present Chief Justice in the recent case of *Stanley vs. Schwalby*, 147 U. S., 508, 512." (Italics added.)

Among the numerous cases in this court announcing and applying the rule we may cite:

Cohens vs. Virginia, 6 Wheat., 264, 380 (5 L. Ed., 257).

United States vs. Clarke, 8 Peters, 436 (8 L. Ed., 1001).

United States vs. McLemore, 4 How., 286 (11 L. Ed., 977).

Hill vs. United States, 9 How., 386 (13 L. Ed., 185).

Murray vs. Hoboken Land, etc., Co., 18 How., 272 (15 L. Ed., 372).

Nations vs. Johnson, 24 How., 195 (16 L. Ed., 628).

United States vs. Tillou, 6 Wall., 484 (18 L. Ed., 920).

Nicholl vs. United States, 7 Wall., 122 (19 L. Ed., 125).

The Siren, 7 Wall., 152 (19 L. Ed., 129).

The Davis, 10 Wall., 15 (19 L. Ed., 875).

United States vs. Thompson, 98 U. S., 486 (25 L. Ed., 194).

Carr vs. United States, 98 U. S., 433 (25 L. Ed., 209).
United States vs. Lee, 106 U. S., 196 (27 L. Ed., 171).
Finn vs. United States, 123 U. S., 227 (31 L. Ed., 128).
United States vs. Gleeson, 124 U. S., 255 (31 L. Ed., 420).
Stanley vs. Schwalby, 147 U. S., 508 (37 L. Ed., 259).
Stanley vs. Schwalby, 162 U. S., 255 (40 L. Ed., 960).
Minnesota vs. Hitchcock, 185 U. S., 374 (46 L. Ed., 954).
International Postal Supply Co. vs. Bruce, 194 U. S., 601 (48 L. Ed., 1134).
Oregon vs. Hitchcock, 202 U. S., 60 (50 L. Ed., 935).
Nagunab vs. Hitchcock, 202 U. S., 473 (50 L. Ed., 1113).
Kansas vs. United States, 204 U. S., 331 (51 L. Ed., 510).
Louisiana vs. Garfield, 211 U. S., 70 (53 L. Ed., 92).
New Mexico vs. Lane, 243 U. S., 52 (61 L. Ed., 588).
Illinois, etc., R. Co. vs. Public, etc., Com., 245 U. S., 493 (62 L. Ed., 425).
Wells vs. Roper, 246 U. S., 335 (62 L. Ed., 755).

Not only, however, is the United States exempt from suit in any court, except by its consent, but such consent must be given by an act of Congress in *express* terms. This is settled beyond dispute by the decisions of this court.

Thus in *United States vs. Clarke*, 8 Peters, 436 (8 L. Ed., 1001), Chief Justice Marshall, speaking for the court, declared:

> "As the United States are not suable of common right, the party who institutes such suit *must bring his case within the authority of some act of Congress*, or the court cannot exercise jurisdiction over it." (Italics added.)

This statement of the rule has been approved and followed in *The Siren*, 7 Wall., 152 (19 L. Ed., 129), *Belknap vs. Schild*, *supra*, and other cases.

In *Stanley vs. Schwalby*, 162 U. S., 255 (40 L. Ed., 960), the principle is stated in these words:

> "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that *no suit can be maintained against the United States or against their property, in any court, without express authority of Congress.* 147 U. S., 512 (37 L. Ed., 261). See also *Belknap vs. Schild*, 161 U. S., 10 (40 L. Ed., 599). The United States by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but *they have never consented to be sued in the courts of a State in any case.*" (Italics added.)

The same point has been expressly ruled in the following cases:

Nicholl vs. United States, 7 Wall., 122 (19 L. Ed., 125).

The Davis, 10 Wall., 15 (19 L. Ed., 875).

Hill vs. United States, 9 How., 386 (13 L. Ed., 185).

Schillinger vs. United States, 155 U. S., 162 (39 L. Ed., 108).

Illinois Central R. Co. vs. Public Utilities Com., 245 U. S., 493 (62 L. Ed., 425).

The rule is further well settled that this exemption of the United States from suit, except by its consent, extends to suits in which the United States is *indirectly* interested as well as to those in which it has a direct interest, and in such *indirect* suits the courts, in the absence of an express grant by Congress, are without authority to enter any judgment that will bind either the United States or its property.

In *Belknap vs. Schild*, 161 U. S., 10 (40 L. Ed., 599), an injunction was sought against the commandant of the

United States navy yard at Mare Island, California, and some of his subordinates, to prevent the use of a caisson gate in the dry dock at that place, contrary to the rights of the plaintiff as patentee. The case was heard on pleas setting up that the caisson gate was made and used by the United States for public purposes and that it was the property of the United States. As the complaint sought, in addition to the injunction, the recovery of damages for the alleged tortious acts of the defendants, the court dismissed the bill without prejudice to the plaintiff to bring a law action, but held that the defendants had no personal interest in the continued use of the gate, and that so far as the injunction was concerned the suit was against the United States. Said the court:

> "There is *no* distinction between suits against the Government *directly* and suits against its property. * * * It necessarily follows that unless *expressly* permitted by act of Congress, no injunction can be granted against the United States." (Italics added).

The case of *International Postal Supply Co. vs. Bruce,* 194 U. S., 601 (48 L. Ed., 1134), was a bill in equity by the plaintiff, as the owner of the patent for a stamp cancelling and postmarking machine, against the defendant as postmaster of the United States post-office at Syracuse, New York, to enjoin the use in such post-office of two machines alleged to be infringements on plaintiff's patent. The machines in question in the Syracuse post-office were leased by the United States Post-Office Department for a term, which had not expired, from the manufacturer and owner, at an agreed rental, and were being used by the employees of the United States. This court declared that the suit was really against the United States and could not be maintained, saying:

> "In the case at bar the United States is not the owner of the machines, it is true, but it is a lessee in possession, for a term which has not expired. It has

> a property—a right *in rem*—in the machines, which, though less extensive than absolute ownership, has the same incident of a right to use them while it lasts. *This right cannot be interfered with behind its back*; and, as it cannot be made a party, this suit, like that of *Belknap vs. Schild*, must fail." (Italics added.)

In *Goldberg vs. Daniels*, 231 U. S., 218 (58 L. Ed., 191), the plaintiff applied to the court for a mandamus against the Secretary of the Navy to compel him to deliver a Government cruiser to the plaintiff as the highest bidder therefor under proposals for the purchase of such cruiser advertised by the Secretary. The lower court dismissed the petition on the ground that whether plaintiff's bid should be accepted was in the discretion of the Secretary. This ruling was affirmed by this court, which said:

> "We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the owner, in possession of the vessel. *It cannot be interfered with behind its back*, and as it cannot be made a party, this suit must fail." (Italics added.)

To the same effect are:

Stanley vs. Schwalby, 162 U. S., 255 (40 L. Ed., 960).

Louisiana vs. Garfield, 211 U. S., 70 (53 L. Ed., 92).

Wells vs. Roper, 246 U. S., 335 (62 L. Ed., 755).

Briefly stated, therefore, the rule to be deduced from the decisions of this court is that a suit, either at law or in equity, cannot be maintained, either *directly* or *indirectly*, against the United States in any court unless *expressly* authorized by an act of Congress.

But to recur to the facts of the present case: The suit is for breach of contracts to transmit and deliver telegrams entered into with the agents of the United States while it was

operating the telegraph system as "a governmental agency," the defendant telegraph company had no interest in or connection with such contracts, the effect of the judgment will be to interfere with the property of the United States by attempting to make collection out of the revenues of the United States, and the joint resolution under which the United States acquired the telegraph system contains not a word of authority to bring such suit. Such being the rule then, and such the facts, the case is identical in principle with the case of *International Postal Supply Co. vs. Bruce, supra*, and is concluded by it; for if the interests of the United States as lessee of a machine are such as to prevent a suit against a postmaster to restrain the use of such machine, *a fortiori* they must be such as to prevent the maintenance of a suit for breach of a contract entered into on behalf of the United States and the recovery of a judgment therein that will affect the property of the United States.

It likewise falls squarely within the decision in *Wells vs. Roper, supra*, for if, as held in that case, a bill in equity will not lie to enjoin the annulment by the Assistant Postmaster General of a contract made in behalf of the United States, certainly an action at law will not lie indirectly against the United States to recover for acts of the agents of the United States constituting a breach of contract entered into by such agents on behalf of the United States.

3. **The judgment herein is inoperative against the United States, and, if effective at all, is effective against the telegraph company.**

The decisions we have just been considering, unless there is something in this case to take it out of their operation, lead to two inevitable conclusions, viz: (1) the United States is the real party in interest, and (2) the suit cannot be maintained and judgment recovered therein *indirectly* against the

United States, since Congress has not seen fit to give the necessary consent therefor.

But it is insisted that paragraph (*e*) of section 8 of the contract entered into between the Postmaster General and the telegraph company gives authority to institute and maintain a suit like this against the telegraph company and thus indirectly to institute and maintain it against the United States, thereby removing it from the operation of the rules to which we have just referred. The provision in question reads thus (Transcript, Ex. 4, p. 46):

> "(*e*) The Postmaster General shall pay, or save the owner harmless from, all expenses incident to or growing out of the possession, operation, and use of the property taken over during the period of Federal control. He shall also pay or save the owner harmless from all judgments or decrees that may be recovered or issued against, and all fines and penalties that may be imposed upon it by reason of any cause of action arising out of Federal control or anything done or omitted in the possession, operation, use or control of its property during the period of Federal control, except judgments or decrees founded on obligations of the owner to the Postmaster General or the United States."

The State Supreme Court gave this provision of the contract the force and effect for which respondent now contends, as appears from this language quoted from the opinion on page 61 of the transcript:

> "While the action and the judgment therein recovered are *in form* against the Western Union Telegraph Company, yet *in effect* they are against the Postmaster General.
>
> "The plaintiff followed the mode of procedure directed by the President in his proclamation and ordered by the Postmaster General, not only in his order hereinbefore mentioned, but also when he ratified the contract between the Western Union Telegraph Company and himself, which contemplated a

judgment *in form* against the defendant Western Union Telegraph Company." (Italics added.)

That this conclusion is wholly unsound is readily demonstrated by a proper construction of the contract, and particularly of section 8, paragraph (*e*) thereof, entered into between the Postmaster General and the telegraph company. In making this interpretation, it is necessary to determine (1) the purpose and meaning of the contract, and particularly of section 8, paragraph (*e*) thereof, and (2) the legality of section 8, paragraph (*e*), of the contract in so far as it submits the rights of the United States to the courts for adjudication.

Considering these propositions in the order stated, we first inquire as to the purpose and meaning of the contract between the Postmaster General and the telegraph company, and particularly of section 8, paragraph (*e*) thereof.

In the joint resolution of Congress of July 16, 1918, authorizing and empowering the President to take possession and assume control of the wire systems, it was distinctly provided "that just *compensation* shall be made for such supervision, possession, control, or operation, to be determined by the President." The system of Western Union Telegraph Company was taken over pursuant to the proclamation of the President on August 1, 1918, and thereafter, on October 9, 1918, it submitted to the Postmaster General a proposal wherein it offered "to accept a just *compensation* for the supervision, possession, control, and operation" of its telegraph system "to be fixed" as set out in detail in the proposal (Transcript, Exhibit 4, pp. 41-51). Among the elements of the just *compensation* thus proposed by the owner was the provision for indemnity against judgments or decrees rendered against it on causes of action "arising out of Federal control," appearing as section 8, paragraph (*e*), of the contract (Transcript, p. 46). The contract was completed by an acceptance of the proposal by the Postmaster General in these words:

> "The proposal of the Western Union Telegraph Company, dated October 9, 1918, *with respect to just compensation* for the use of the properties owned by them during the period of Federal control * * * is hereby accepted on behalf of the United States, and *compensation* will be paid in accordance with the terms and provisions thereof." (Italics added.)
>
> (Ex. 4, Transcript, p. 41.)

Under the facts, therefore, as well as under the decisions in *Dakota Central Telephone Co. vs. South Dakota ex rel. Payne*, 250 U. S., 163 (63 L. Ed., 910), and *Krichman vs. United States*, 263 Fed., 538, construing precisely similar contracts, the sole object and purpose of this contract was to provide for *compensation* to, not liability against, the owner for the use of its property by the United States.

Having ascertained the purpose of the contract, it is next in order to inquire as to the meaning and reason for the provision for indemnity against judgments and decrees found in paragraph (*c*) of section 8.

It is quite obvious that this provision is *no affirmative grant* of a right to sue *anyone* on a "cause of action arising out of Federal control." On the contrary, in so far as the right of suit is concerned, it is wholly negative, its plain primary meaning being that either in the event suit should be entered against the owner corporation on a cause of action arising out of Federal control and a recovery defeated, or in the event that such suit should be entered and a judgment recovered, then in the first case the expenses incident to the defense of the suit, and in the second case the judgment and the expenses incident thereto should be treated as liabilities of the United States, and *should not be deducted out of the compensation* to be paid to the owner for the use of its property by the United States.

Manifestly, therefore, the purpose of the provision was *not* to give a right of action, but *to provide for contingencies*, viz., either the contingency of the owner being compelled to de-

fend at its own *expense* suits against it on causes of action arising out of Federal control, or the contingency of ultimate *liability* against the owner on such causes of action being found by the courts to exist either by virtue of then existing law or of law subsequently to be enacted.

At the time the telegraph company's system was taken over by the United States, and for many years prior thereto, suits against such company were of daily occurrence in the various State and Federal courts throughout the country. It was evident at the outset that parties with grievances, real or fancied, growing out of transactions had in the conduct of the telegraph business, would not cease bringing these suits merely because of the President's proclamation, and that some one would have to defend such suits when they were brought. But if the suits were brought against the telegraph company, clearly it would be compelled to defend or else suffer a recovery against it by default. Whether it ultimately won or lost, such company would have to pay its attorneys' fees and at least some part of the court costs and disbursements. When it is recalled that experience extending over a long period of years had established the fact of an annual average of more than one thousand of these suits, it is quite apparent that the aggregate annual cost of defending, and of ultimately defeating many of them in which adverse initial judgments should be rendered, would be enormous. Hence the telegraph company faced the practical consideration of the necessity for making provision for the expense of defending suits brought against it on causes of action arising out of Federal control, regardless of its success or lack of success in defeating a recovery against it in such suits. In fact, as the company knew from experience, the annual expense of defending suits practically equalled the amount paid out in satisfaction of judgments; so it was quite as important to have the Postmaster General agree to take care of the expense of the suits as it was to have him agree to pay the judgments. To meet and provide for this con-

dition must therefore be considered the first object of this paragraph of the contract, which expressly requires the Postmaster General to "pay * * * all expenses incident to or growing out of the possession, operation, and use of the property," as well as "all judgments or decrees." Without such a provision, judgments would have been obtained against the telegraph company on causes of action "arising out of Federal control" and the United States would have been under no obligation to reimburse such company for the expenses incurred by it in employing counsel and otherwise in order to be rid of such judgments.

The two other practical considerations confronting the telegraph company at this time were the doubt as to whether the court would decide that such company could be held liable under the provisions of the joint resolution, and the possibility of the subsequent enactment by Congress of a valid law establishing such liability. As to liability under existing law, it must be borne in mind that at this time this court had neither construed the proviso of the joint resolution saving the "lawful police regulations of the several States," nor determined the status existing among the United States, the several States, and the telegraph company under the action of the President exerted pursuant to the authority of the joint resolution, and that it was not until some eight months thereafter that these questions were settled in the *Dakota Central Telephone Co. case, supra*. Not only, however, was there this uncertainty as to the right to sue the owner "on causes of action arising during Federal control" under existing State laws, but there was like uncertainty as to what action Congress would take in the future looking to giving a right of action in such cases against the owner corporations. No doubt the officers of the telegraph company as well as of the United States knew that a proposal to give such a right had been rejected by Congress when the joint resolution had been adopted, but this was no guarantee that it would not enact it in future; and in fact they must have known that was pre-

cisely what Congress had done with respect to railroads in enacting section 10 of the Federal control act of March 21, 1918, which was passed long subsequent to the action of Congress and the President under which the railroad systems were seized. Actuated, therefore, by the certainty of being forced to incur expenses in the defense of suits brought against it on causes of action arising out of Federal control and by the further fear of liability being held by the court to exist, either by virtue of State laws not superseded by the action of Congress and the President, or by laws subsequently enacted by Congress, it was but natural that the telegraph company, in submitting a proposal for just compensation for the use of the property of which it had been deprived, should include a demand that it be indemnified by the United States against the expense of such suits and the effect of all judgments recovered therein. By making this demand, the telegraph company neither admitted nor intended to admit liability on such causes of action, either under the law as it then stood or as it might be thereafter enacted, but realizing the certainty of incurring expense in defending suits and the contingency of a ruling by the courts or an enactment by Congress making it liable in such suits, it merely, out of the abundance of caution sought and obtained from the United States an agreement to indemnify and save it harmless from all such suits and judgments. In brief, the purpose of the entire contract is to make just *compensation* to the telegraph company and not to provide a right of action against it for the defaults of the agents of the United States; while the object and meaning of section 8, paragraph (*e*), of the contract is merely to provide for indemnity against the expenses of all suits against the telegraph company on such causes of action and against the judgments and expenses in all such suits wherein a recovery should be had against such company, either by virtue of the law as it then stood or by virtue of subsequent legislation by Congress. But if this be the true interpretation of the contract, and especially of the sec-

tion relied on by the court, it is quite manifest that the conclusion of the court is wholly unfounded, for it is rather difficult, if not impossible, to perceive how a provision inserted in a contract by the first party thereto as a protection against the expense of defending suits brought against it for the acts of the other party and against the possible contingency of a ruling by the courts making such first party liable for the acts of the other party thereto, or the possible contingency of a legislative enactment to the same effect, can be construed as authority to maintain such suits against such first party, especially where the contemplated legislative action has never been taken and where the courts have not only failed to make the contemplated ruling but have so decided as to make such ruling impossible.

From what has been said, it must inevitably follow that the court erred in construing this negative section of the contract as an affirmative grant of power to sue the telegraph company in the State court and pass the judgment therein on to the United States for payment.

This brings us to a consideration of the second reason given above for interpreting the contract as not giving a right to recover a judgment in form against the telegraph company but in effect against the United States, viz: the illegality of section 8, paragraph (*e*), of the contract if construed as an attempt to submit the rights of the United States to the courts for adjudication.

In the case of *Hobbs vs. McLean*, 117 U. S., 567 (29 L. Ed., 940), this court said:

> "It is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

We have endeavored to show that the true interpretation of section 8, paragraph (*e*), of this contract is merely that in case it be held by the courts that under the then existing

law, or in case it be subsequently enacted by Congress, that a judgment can be rightfully obtained against the owner corporation on a cause of action arising out of Federal control, then and in either event the United States will pay the judgment and not deduct the amount thereof from the compensation agreed to be paid the owner for the use of the property.

As thus construed, the meaning of the contract is clear to all and entirely free from even a tinge of illegality. But if it is to be construed, as the Supreme Court of South Carolina held, and the respondent now contends, as an affirmative grant of authority to bring suit against the telegraph company and collect from the United States the judgment obtained therein, then, as we shall show, such construction is clearly illegal and must be rejected under the principle quoted from *Hobbs vs. McLean, supra.*

The decisions to which we have heretofore referred establish beyond controversy that the United States is the real party in interest in this case. In fact, this much is virtually admitted by the Supreme Court of South Carolina, for it says in its opinion that "the action and judgment therein recovered are *in form* against the Western Union Telegraph Company, yet *in effect* they are against the Postmaster General" (Transcript, p. 61).

As we have already shown, no suit can be maintained, either directly or *indirectly*, against the United States without its consent, and this consent cannot be inferred, but must be given in *express* terms by an act of Congress. It is evident from a mere inspection that the contract does not even purport to give a right to sue the United States, but even conceding, for the sake of argument, that it does, yet this does not help out respondent's contention. The joint resolution of Congress, pursuant to which the contract was executed, neither authorized nor consented to suits against the United States, nor authorized the Postmaster General to enter into any contract wherein such consent should be given. The contract between the Postmaster General and the tele-

graph company is a purely private matter. It certainly is not an act of Congress or a resolution of Congress, neither is it a public or general order of the Postmaster General having the force and effect of an act of Congress. A stipulation in such private contract attempting to give consent to sue the United States is utterly unlike the general orders issued by the Director General of Railroads, with the approval of the President, because the right to make such orders and embrace therein the subject-matter thereof was *expressly given* by act of Congress, while here there was not only no *express* provision, but *no provision at all* in this act of Congress authorizing the Postmaster General to consent to a suit, either directly or indirectly, against the United States. Such being the facts under which it was made, if section 8, paragraph (*c*), of the contract is held to be an attempt to consent to maintain suits against the United States in the State courts, it is illegal and void. This, we submit, is the irresistible conclusion to be deduced from the decisions of this court to which we now refer.

In *Case vs. Terrell*, 11 Wall., 199 (20 L. Ed., 134), this court, in speaking of the extent of the powers of the Comptroller of the Currency, said

> *"He has no authority to subject the United States to such jurisdiction, and to submit the rights of the Government to litigation in any court, without some provision of law authorizing him to do so."* (Italics added.)

Speaking of the authority of the Secretary of the Treasury, this court, in *Carr vs. United States*, 98 U. S., 433 (25 L. Ed., 209), declared:

> "He may have deemed it prudent to assist the officers who were sued, without intending to waive any of the rights of the Government. And, in fact, *he had no authority to waive those rights.*" (Italics added.)

In *United States vs. Lee*, 106 U. S., 196 (27 L. Ed., 171), Mr. Justice Miller, delivering the opinion of the court, stated the principle thus:

> "There is vested in *no officer* or body *the authority to consent* that the State shall be sued, except in the law-making power, which may give such consent on the terms it may choose to impose." (Italics added.)

In *Stanley vs. Schwalby*, 162 U. S., 255 (40 L. Ed., 960), suit was brought in a State court of Texas to try title to a part of a military reservation of the United States, and the district attorney, professing to represent the United States and to be acting under instructions of the Attorney General, appeared in the cause and joined in the answer. This court, after holding that the United States had "never consented to be sued in the courts of a State in any case," said:

> "The answer actually filed by the district attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney General, and *of any power vested by law in him or in the district attorney*, and could not constitute a voluntary submission by the United States to the jurisdiction of the court." (Italics added.)

Without multiplying quotations, we cite the following directly applicable cases:

The Davis, 10 Wall., 15 (19 L. Ed., 875).
Finn vs. United States, 123 U. S., 227 (31 L. Ed., 128).
Price vs. Abbott, 17 Fed., 506.
Northern Bank vs. Stone, 88 Fed., 413.
Railroad Tax cases, 136 Fed., 233.
United States vs. Pearson, 231 Fed., 270.
Gouge vs. Hart, 250 Fed., 802.
Jacob Hoffmann Brewing Co. vs. McElligott, 259 Fed., 321.
Westbrook vs. Director General, 263 Fed., 211.

In so far, therefore, as anything in the joint resolution authorizing the seizure of the telegraph lines is concerned, the action of the Postmaster General in attempting by section 8, paragraph (*e*), of the contract to consent to suits against the United States on causes of action arising out of Federal control, if it can be construed as such consent, was wholly unauthorized. Hence, when the Supreme Court of South Carolina found that the judgment was "in effect against the Postmaster General," it should have dismissed the case.

But conceding the contract contains a consent to sue the United States, the only statutes under which it could possibly have been authorized were section 145, paragraph 1, and section 24, paragraph 20, of the Judicial Code, wherein the United States has consented to be sued on claims similar to that here involved either in the Court of Claims or the district court, the court of any particular suit to be determined by the amount in controversy. Section 145, paragraph 1, of the Judicial Code provides:

> "The Court of Claims shall have jurisdiction to hear and determine the following matters: First. All claims (except for pensions) founded upon the Constitution of the United States or any law of Congress, upon any regulation of an Executive Department, upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however*, That nothing in this section shall be construed as giving to the said court jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as 'war claims,' or to hear and determine other claims which, prior to March third, eighteen hundred and eighty-seven, had been rejected or reported on adversely by any court, department, or commission authorized to hear and determine the same."

And section 24, paragraph 20, of the Judicial Code is as follows:

> "The district courts shall have original jurisdiction as follows:
>
> * * * * * * *
>
> "20. Concurrent with the Court of Claims, of all claims not exceeding $10,000, founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an Executive Department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable."

These sections had been long on the statute books at the time the joint resolution was adopted, and no doubt the knowledge of their existence and the completeness of the remedy they afforded were the determining factors that influenced Congress not to encumber the joint resolution with additional provisions as to suits.

Not only, however, has it been settled by this court that authority to sue the United States, directly or indirectly, must be *expressly* given by an act of Congress, but it is equally well settled that the grant of a right to sue the United States, even when expressly given by Congress, must be construed in strict accordance with its terms. Thus in the recent case of *Illinois Central Railroad Co. vs. Public Utilities Commission*, 245 U. S., 493 (62 L. Ed., 425), Congress had given permission to sue the United States, but only in designated judicial districts. The plaintiff brought his suit in a district other than that in which the act of Congress had authorized suit, and this court, holding that the terms of the grant to sue must be absolutely followed, dismissed the complaint.

Among the numerous cases applying the principle, we refer the court to:

Beers vs. Arkansas, 20 How., 527 (15 L. Ed., 991).
Nicholl vs. United States, 7 Wall., 122 (19 L. Ed., 125).
Schillinger vs. United States, 155 U. S., 162 (39 L. Ed., 108).

The consent to sue the United States, if it be such, found in section 8, paragraph (*e*), of the contract, must therefore, by force of this principle, be construed in connection with section 145, paragraph 1, and section 24, paragraph 20, of the Judicial Code, the only statutes under which it could have possibly been authorized. So construed, the consent gave *absolutely no authority* to maintain in *any State court* this suit in which the United States was the real and sole party in interest. The plaintiff's rights, if rights he had, could only be determined by the district court or the Court of Claims of the United States, as they, and they alone, were vested with authority and jurisdiction to render a judgment effective against the United States as the real defendant in the action.

In the recent case of *Heil vs. United States* (District Court, New York, decided June 15, 1920, not yet reported), the plaintiffs brought suit against the United States in the District Court for the Southern District of New York to recover for the loss sustained by failure to transmit a cable message for the purchase of pounds sterling on the London exchange. The Government contended that it was not liable to the plaintiffs for failure to transmit the message, but this contention was denied by the court. The opinion is so pertinent to the present issue that we set it out in full as Exhibit "C" in the appendix hereto.

In the precisely analogous cases of *Belknap vs. Schild* and *Wells vs. Roper*, *supra*, this court held that the suits could not be maintained, but that the parties must, under the Fed-

eral statutes which now appear as section 145 and section 24, paragraph 20, of the Judicial Code, be remitted for relief to the Court of Claims or the District Court of the United States. These cases are conclusive here, and render further discussion unnecessary.

From these considerations we are forced to the conclusion that there is no warrant for holding, as the State court has done, that the contract allows the recovery of a judgment in form against the owner but in effect against the United States, and from such conclusion it must follow that the judgment is inoperative against the United States, and if effective at all, is effective against the telegraph company.

III.

CONSTITUTIONAL OBJECTIONS TO THE MAINTENANCE OF THIS SUIT AND THE RECOVERY OF A JUDGMENT THEREIN EFFECTIVE AGAINST THE OWNER TELEGRAPH COMPANY.

As we have seen, the judgment is ineffective against the United States, the party *really* liable; but it is in *existence* and is *in form* against the telegraph company; hence until reversed by competent authority, it is both *effective* and *enforcible against the telegraph company*. The question, then, is, can a judgment against the telegraph company under the facts of this case, for a liability wholly of the United States, stand under the provisions of the Fifth and Fourteenth Amendments to the Federal Constitution?

In determining this question it becomes necessary to consider and ascertain the rights of the telegraph company and the application thereto of each of the constitutional amendments in question. Hence we inquire as to

1. Due Process of Law under the Fifth Amendment.

The Fifth Amendment to the Constitution of the United States declares that "no person * * * shall be deprived of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation." This amendment is a direct limitation on the powers of the Federal Government and is here invoked as applicable to any authority to institute this suit and recover a judgment against the owner corporation by virtue of a grant exerted under the authority of an act of Congress.

Vast as are the powers of the United States in time of war, yet these powers are not so extensive as to authorize the violation of any of the provisions of the Constitution. In the leading case of *Ex parte Milligan*, 4 Wall., 2 (18 L. Ed., 281), this court declared the principle in these words:

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false."

To the same effect are:

The Legal Tender Cases, 12 Wall., 457 (20 L. Ed., 287).

Hamilton vs. Kentucky Distilleries, etc., Co., 251 U. S., 146 (64 L. Ed., —).

Had Congress therefore attempted even by statute to confer upon the respondent in this case a right of action against the telegraph company for the obligations of the United States in its management and operation of the telegraph sys-

tem, its action would have encountered these prohibitions of the Fifth Amendment against the taking of private property without due process of law. Consistently with due process of law, private property can only be taken for public use, and only then when necessary for the paramount purposes of the Government, and even this right cannot be exercised except upon payment of just and adequate compensation.

> *United States vs. Cress*, 243 U. S., 316 (61 L. Ed., 746).

Hence, where the private property of the telegraph company is made subject to the satisfaction of a demand due by the United States to an utter stranger to such company, it is manifest not only that such property is being used for the purpose of paying a debt of the United States for which the company is not responsible, but also is being devoted to the private use of such stranger in making payment of his demand.

As we have heretofore shown, no authority whatever for bringing this suit against the telegraph company can be found in the action either of Congress or of the President, the respondent basing his claim to such right solely on a supposed authority conferred by the Postmaster General in the contract for compensation entered into between him and the company. This action of the Postmaster General, granting to it the scope and effect urged by the respondent, was, under the decisions of this court, wholly *ultra vires* if it was intended to confer jurisdiction of an action like this on a State court. But waiving this contention and assuming that Congress granted this official such authority, the result must be the same, and for the reason that the action, whether authorized or unauthorized, in so far as it contemplates the recovery of a judgment against the telegraph company in a case like this is a denial of due process of law. In defining the scope and meaning of this provision of the Constitution,

this court, in the recent case of *Ochoa vs. Hernandez*, 230 U. S., 139 (57 L. Ed., 1427), said:

> "Without the guaranty of 'due process' the right of private property cannot be said to exist, in the sense in which it is known to our laws. The principle, known to the common law before Magna Charta, was embodied in that charter (2 Coke, Inst., 45, 50), and has been recognized since the Revolution as among the safest foundations of our institutions. Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and without notice or an opportunity for a hearing."

To permit this suit to be maintained against the present defendant for the acts of the Government, for which acts, as has been shown, it was in no way responsible, would be in direct violation of this last statement of the principle of due process of law, for it would certainly be the taking of its property to pay the debts of another contrary to all the settled usages of our jurisprudence. As was once well said by the late Mr. Justice Peckham:

> "There are some things so contrary to justice as to admit of no doubt of their utter illegality, such as the arbitrary taking under the form of a legislative enactment, of the property of one man and bestowing it upon another."

The decisions construing the acts of Congress and the proclamation of the President demonstrate to a certainty that at the time this cause of action accrued the property of the defendant was being operated by the United States, and therefore that the liability sought to be enforced in the complaint was that of the Government. However, the judgment has been rendered against the defendant as the owner of the property for acts over which it, as a matter of fact, did not

exercise, and, as a matter of law, could not have exercised, any control. The assertion, therefore, that this suit can be maintained against it, despite these facts, is a bald assertion that the owner can be made liable for the acts of the United States irrespective of its connection with the contracts or circumstances out of which the suit arises.

A recent instructive case, holding that such a result cannot be accomplished under the constitutional provision here invoked, is *Daugherty vs. Thomas*, 174 Mich., 371; 140 N. W., 615; Ann. Cas., 1915A. 1163; 45 L. R. A. (N. S.), 699. In that case the court had under consideration a statute of Michigan that made the owner of a motor vehicle personally liable for any accident that might occur from the negligent operation of such vehicle by any person that might be using it with or without the consent of such owner. The court, after making an extended review of the cases, reached the conclusion that the statute in question was clearly unconstitutional, saying:

> "To hold subdivision 3 of section 10 constitutional is to hold a party absolutely liable for the negligent conduct of another, a mere stranger or a wilful trespasser, no matter how careful or free from negligence he himself has been. We think that the result of such holding would be to take the property of defendant Thomas to pay for the wrongful and negligent act of another person not sustaining to him the relation of servant, agent or employee. Such a doctrine seems unnatural and repugnant to the provisions of the Constitution here invoked. We are forced to the conclusion that the provisions of this subdivision are not a necessary regulation in the exercise of the police power; that in and by its terms the plain provisions of the Constitution are violated; and the subdivision must be held unconstitutional, and the statutory liability therein asserted done away with."

The rule is thus tersely stated in 12 C. J., at page 1244:

> "The owner of property, the ordinary use of which is beneficial to the public, cannot be made liable for the negligence of one not a servant or occupying a similar relation."

The use of the defendant's telegraph system by the United States was certainly beneficial to the public, and, as has already been shown, the Government was in no sense a servant, agent, employee, or lessee of the owner. Therefore, this statement of the rule is directly applicable to the facts of the present case.

Other authorities holding that due process of law forbids making one person liable for the debt of another are these:

Cooley, Const. Lim., 7th Ed., 150.

Attorney General vs. Old Colony R. Co., 160 Mass., 62; 22 L. R. A., 112.

Colon vs. Lisk, 153 N. Y., 188; 60 Am. St. R., 609.

Knoxville Traction Co. vs. McMillan, 111 Tenn., 521; 65 L. R. A., 296.

In the latter case, we find this clear statement:

> "The statute arbitrarily imposes upon the traction company liability for this debt of the advertising company and requires it to pay it with its own means. This is a deprivation of property without a hearing or due process of law clearly within the prohibition of the constitutional provision relied upon. This is too obvious for argument, and the property of one citizen can no more be taken to pay a tax or public debt due from another than the private debt of such other person."

The liability of the United States Government, if such liability exists, to the present plaintiff for failure to deliver promptly the telegrams involved in this case, was in no sense a public liability but solely private, or, in other words, a

liability that existed between the Government and the plaintiff alone. If the property of this defendant is to be taken to pay such a debt, it is patent that it would be a diversion of its property to a private purpose and therefore within the inhibition of the due process of law clause of the Fifth Amendment.

In the case of *Missouri Pacific R. Co. vs. Nebraska*, 164 U. S., 403 (41 L. Ed., 489), where a railroad commission ordered a railroad company to furnish a portion of its right of way to individuals for the purpose of erecting a grain elevator, this precise question came before this court and the right to take the property for such purposes was denied by the court, which said:

> "This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question so far as it required the railroad corporation to surrender a part of its land to the petitioners for the purpose of building and maintaining their elevator upon it, was in essence and effect a taking of private property of the railroad corporation for the private use of the petitioners. The taking by a State of the private property of one person or corporation without the owner's consent for the private use of another is not due process of law and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States."

The same principle has been applied in the subsequent cases of:

Missouri Pacific Railroad Co. vs. Nebraska, 217 U. S., 196 (54 L. Ed., 727).

St. Louis, etc., Railroad Co. vs. Wynne, 224 U. S., 354 (56 L. Ed., 799).

Eubank vs. Richmond, 226 U. S., 137 (57 L. Ed., 156).

Chicago, etc., R. Co. vs. Polt, 232 U. S., 165 (58 L. Ed., 554).

Los Angeles vs. Los Angeles Gas, etc., Corp., 251 U. S., 32 (64 L. Ed., —).
Brooks-Scanlon Co. vs. Railroad Commission, 251 U. S., 396 (64 L. Ed., —).
Great Northern R. Co. vs. Cahill, — U. S., — (decided May 17, 1920; not yet reported).

It is suggested, however, that under the contract between the telegraph company and the Postmaster General, such company would have a right of action over against the United States in case it is compelled to pay the judgment, and therefore this removes all constitutional objections. Such a contention finds support neither in reason nor in authority.

A right of action over resulting from the payment of a judgment is based on the fundamental principle that the party against whom it is sought to recover in this latter action was not only legally liable, but also subject to suit in the court which rendered the judgment. But it has been shown that the United States was the real party in interest in this suit and that the court which rendered the judgment was devoid of any jurisdiction in the premises. This being true, the telegraph company, after paying the judgment, would have no legal ground upon which it could make a demand on the United States for reimbursement. Such being the facts, it is clear that the telegraph company, if it paid such a judgment, would not have an absolute right to compensation but only a contingent right which would be subject to be defeated by the United States in the Court of Claims or the district court. To the fact that the right to recover compensation by suit against the Government would be contingent must be added the further fact that even if a right of action existed for such compensation, the relief afforded would be both expensive and inadequate. This results from the reason that there is no authority in the existing Federal statutes for an award, either by the Court of Claims or by

the District Court, of a sum of money in addition to the amount of the claim sufficient to compensate for the expenses incident to the proceeding in such court to enforce the right. Obviously, therefore, even if the face of the claim should be ultimately paid, the expenses incident to its adjudication would necessarily have to be borne by the claimant, and to this extent the recovery would be diminished, which diminution would measure the failure of the remedy to provide just and adequate compensation.

It has been frequently held that even where authority may be exercised for acquiring private property for public purposes, due process of law requires that the compensation must be both certain and adequate. In such cases, the means of securing indemnity must be such that the owner will run no risk. Among the cases applying this principle are:

Attorney General vs. Old Colony Railroad Co., 160 Mass., 62; 22 L. R. A., 120.

Haverhill Bridge vs. Essex County, 103 Mass., 120; 4 Am. Rep., 518.

Louisville, etc., Railroad Co. vs. Central Stock Yards Co., 212 U. S., 132 (53 L. Ed., 441).

But if due process of law is not afforded in a case where property is authorized to be taken, but compensation therefor rests on a subsequent and contingent right of action against another party, for much greater reasons it is not afforded where the taking in the first instance was wholly unauthorized and only a subsequent, uncertain and contingent right of action by way of compensation was left to the owner as his only means of redress. As has been pointed out, the right of action of this defendant against the Government is wholly uncertain and contingent and can be defeated at any time the Government raises the question in the Federal courts where the suit to force the indemnity is brought. This completely destroys all semblance of due process of law

in the contention that the present defendant can be held liable for the acts of the United States in handling the telegrams involved in the present case.

The precise question here involved has recently been considered by one of the courts of New York and by several of the lower Federal courts in suits involving the liability of the transportation corporations for the acts of the United States during the period of Federal control of their properties, and in each of these cases the contentions we here make have been sustained. The language of the case referred to in New York, *Schumacher vs. Pennsylvania Railroad Co.*, 106 N. Y. Misc., 564; 175 N. Y. Supp., p. 84, is so pertinent that we quote at length:

> "If our view and construction of the statute in question is correct, we are face to face with the legal question whether, in so far as it authorizes actions and judgments against carriers for the negligence or default of the Government or its agents, such provisions are constitutional and valid. To state the question is to answer it. We can reach no other conclusion than that in that respect Congress has exceeded its constitutional powers. It is repugnant to the great underlying principles of our jurisprudence and violates, we think, the express provisions of the Fifth Amendment to the Federal Constitution, declaring:
>
> "'No person shall be * * * deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.'
>
> *"Certainly the taking of the property of a corporation to pay the debt or liability of the Government, for which the corporation is in no way responsible, violates this provision of the Constitution, and deprives it of the equal protection of the law.*
>
> "It probably was the intention of the framers of the statute that the Government should ultimately pay all such demands as in justice and by right it should. It is impossible to believe that the contrary was in their minds, but the statute nowhere so provides. If

the carrier were compelled to pay the judgment thus sought to be entered, it would undoubtedly have a just demand against the Government to be reimbursed for moneys so paid, but the fact that such a demand exists in no way cures the statute of the infirmity of unconstitutionality. *The taking of the property of one to pay the debt of another is none the less illegal, even though the party wronged may assert his right for compensation. The condemnation is against the illegal taking, and the violation of this constitutional guaranty is not cured by the possibility of future restitution.*

"It is urged by plaintiff's counsel that the United States, like every sovereign Government, has the inherent power to take private property for public use (*United States vs. Jones*, 109 U. S., 513; 3 Sup. Ct., 346; 27 L. Ed., 1015), and that this right is not dependent upon any provision of the Constitution for its exercise (*Boom Co. vs. Patterson*, 98 U. S., 406; 25 L. Ed., 206); and it is argued that the exercise of this right, as provided by section 10 of the act of March 21, 1918, is simply an exercise of such a power and cannot be questioned, particularly as it is in the nature of a war measure and in aid of a vigorous prosecution of the war. *The act*, however, under consideration, goes further, in that it *provides*, not *for the taking* of the defendant's property by the Government itself, but *by a third party to pay a Government liability, the enforcement of a liability against a party in no way legally responsible for it.* To carry the argument to its logical extent, it might with equal propriety be urged that Congress had the right to authorize actions against private individuals for the payment of Government bonds.

"*We can reach no other conclusion than that the act of March 21, 1918, in so far as it authorized judgments against carrier corporations for the default or liabilities of the Government, violates the Federal Constitution, providing against the taking of private property 'without due process of law.'*" (Italics added.)

In *Hatcher & Snyder vs. Atchison, etc., R. Co.*, 258 Fed., 952, the court said:

> "The plaintiffs' contention is based at last upon section 10 of the act of March 21, 1918 (Comp. St., 1918, sec. 3115¾*j*). My view as to the part of that section relied on is so clearly expressed in *Vaughn's case*, 81 South., 417 (Alabama Court of Appeals, March 18, 1919), cited in the plaintiffs' brief, that I quote the language used:
>
> "'The only authority for suing a carrier while under Federal control must be rested upon the act of Congress which subjects them "to all laws and liabilities as common carriers, whether arising under State or Federal laws, or at common law," with certain exceptions and provides that "actions at law or suits in equity may be brought by and against such carriers and judgments rendered as now provided by law," etc. U. S. Comp. Stat., 1918, pp. 456-458. And *the validity of this statute is sustainable on no other theory than that the transportation companies are operating their respective systems under Federal control. If such companies are in no way connected with the operation of their respective transportation systems, we submit that it would not be within the power of Congress to subject them to liability and suits thereon for the torts, miscarriages, and defaults of the employees of the Federal Government. Such an act would be an arbitrary exercise of legislative power contrary to the established principles of private rights and distributive justice and tantamount to a denial of due process of law. Zeigler vs. S. & N. A. R. R. Co.*, 58 Ala., 594; *Mobile Light & R. R. Co. vs. Copeland & Sons*, 15 Ala. App., 235; 73 South., 131; *Bank of Columbia vs. Okley*, 4 Wheat., 235 (4 L. Ed., 559); *Hurtado vs. California*, 110 U. S., 516; 4 Sup. Ct., 111, 292; 28 L. Ed., 232; *Dent vs. West Virginia*, 129 U. S., 114; 9 Sup. Ct., 231; 32 L. Ed., 623; *Leeper vs. Texas*, 139 U. S., 462; 11 Sup. Ct., 577; 35 L. Ed., 225; *Giozza vs. Tiernan*, 148 U. S., 657; 13 Sup. Ct., 721; 37 L. Ed., 599; *Jones vs. Brim*, 165 U. S., 180; 17 Sup. Ct., 282; 41 L. Ed., 677; *Maxwell v. Dow*,

176 U. S., 581; 20 Sup. Ct., 448, 494; 44 L. Ed., 597; 6 Rul. Cas. Law, pp. 433-446, embracing paragraphs 430 to 442, on Constitutional Law.

" 'On the other hand, if the carriers are operating under Federal control and are agencies of the Government, the authority of Congress to impose liability on the carriers for the torts of their employees is clearly sustainable on the theory that such responsibility encourages caution on the part of the carriers and their employees, promotes efficiency and safeguards the interests of the Government and the general public.

" 'There is no proof in this case that the Railroad Administration, in the exercise of Federal control, has excluded the transportation companies from the exercise of their functions in the operation of their respective systems, and we cannot assume that it has done so contrary to the manifest purpose and spirit of the authority conferred by the act of Congress and the proclamations of the President.'

"*That court, however, appears to have taken the view that the congressional acts only authorized a superintending control and management* by the Government of the companies and their roads, and expressly said that there was no evidence in the case before them showing that the companies had been excluded 'from the exercise of their functions in the operation of their respective systems,' which *is not in accord either with the construction of the acts given in the North Dakota case nor with the actual facts now of common knowledge. Certainly there is no power in Congress to make A liable and suable for the acts of B. Fundamental principles of justice cannot be overturned by legislative fiat, to say nothing of constitutional guarantees.*" (Italics added.)

As has been shown in the discussion of the present case, the telegraph company did not operate its system under Federal control; therefore under the reasoning employed by the court in the case just quoted, an attempt on the part of Congress to hold it liable would be an arbitrary exercise of legis-

lative power and would be prohibited under the due process of law clause of the Fifth Amendment.

In *Haubert vs. B. & O. R. Co.*, 259 Fed., 361, the court said:

> "Manifestly it seems to me that in view of these conditions no liability exists against the railroad company itself for a personal injury due to operation under Federal control, and that no judgment can be rendered therefor which will become a lien upon the corpus of its property or payment compelled therefrom. *If this were done, the result would be that one person's property would be taken without his consent and without compensation to pay the debt of another.*" (Italics added.)

And in *Nash vs. Southern Pac. Co.*, 260 Fed., 280, we find this clear statement by the court:

> "But that it was intended as the purpose of section 10, as urged by plaintiff, to authorize suits against the owners of these properties in causes of action arising out of transactions had with the Federal Railroad Administration, or through torts committed by its agents while under its control—things for which, we repeat, *the owners could be in no way responsible*—may not for a moment be indulged; *such a construction would clearly render the provision obnoxious to the objection of authorizing the taking of property without due process of law, a purpose which may not be imputed to Congress.*" (Italics added.)

Again, in *Westbrook vs. Director General*, 263 Fed., 211, it is said:

> "If liabilities arising during Government operation are to be recognized at all, manifestly they should be recognized as liabilities of the United States, at least to the extent that the 'revolving fund' would pay them, while *to make them liabilities of the owning companies would be unconstitutional;* for the war power itself is subject to other applicable constitutional provisions." (Italics added.)

In the recent case of *Lane vs. Hines* (District Court, E. D. of S. C., decided August 30, 1920, not yet reported), which was a suit to recover damages for injuries sustained in a derailment on a railroad operated by the defendant, the court construed section 10 of the Federal Control Act applying to the transportation companies and held that if such act created liability against these companies for the acts of the United States, it was clearly unconstitutional. The language is so pertinent that we quote at length:

> "If the meaning of the language of this provision could be construed to mean that the former carriers, the original owners, who had been ejected from their possession, were liable for and could be sued for the negligence or dereliction of the United States, while operating the railroads, the act would be plainly unconstitutional. *There is no power in the United States, under the Constitution of the United States, that would permit it to eject a man from the possession of his property and take entire control and possession of that property and operate it for the benefit of the United States, and under the orders and control of the officers of the United States, and for the purposes of the United States, without the former owners having anything whatsoever to do with its operation or any power of control over it, and then hold the former owners liable for the negligence of the officers or employees of the United States.*
>
> "*Any such enactment would upon the face of it be wholly unconstitutional and in derogation of constitutional right.* The only logical and constitutional construction that can be given to the language of this section 10 is that it is meant to apply to any actions or suits that may be brought against the former owners for any acts of theirs arising in any way not inconsistent with the provisions and the requirements of the act; that in any such action the carrier shall still be continued to be responsible.
>
> "The present action is not one of those. It is an action brought directly against the Director General for the negligence of his own employees, who are the

employees of the United States, operating this property in the possession of the United States, for the benefit of the United States. Any fund that proceeded from this operation is expressly declared to be the property of the United States, and any liability accrued by reason of and during that operation should reasonably and justly be paid by the United States.

"The object, therefore, of the present action at law is to fasten a liability upon the United States for the acts of its employees, which is to be paid out of the funds belonging to the United States, and the only construction to be given to the language of section 10 consistent with the provisions of the United States Constitution is that thereby it was intended to mean that persons injured or having claims arising out of the operation of these railroads could enforce a recovery on those claims by an action against the proper officer responsible for the operation.

"Such appears to have been the construction placed upon the statute by the Director General himself, for by General Orders 50 and 50*a*, instructions were given that all actions to be brought for injuries suffered from the operation of these railroads while in the possession of the Director General, should be brought against him as Director General of Railroads, and not against the railroad company whose property was in his possession, and on which property or by the use of which the accident might at the time have happened." (Italics added.)

In the light of these principles, the only conclusion possible is that if authority to maintain this suit against the telegraph company has been given in any way by Congress, such attempted grant of power is a denial of due process of law and therefore forbidden by the Fifth Amendment.

2. Due Process of Law under the Fourteenth Amendment.

The Fourteenth Amendment to the Constitution declares that *no State* shall "deprive any person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws."

As we have shown, there is no warrant in any action of Congress for bringing this suit against the telegraph company, the provision of the contract entered into with the Postmaster General, respecting indemnity, being wholly insufficient for this purpose. The *existence of the judgment* against the telegraph company and *its effect* against such company *result wholly from the action of the State courts* in reading a provision for liability into the joint resolution and do not rest in any way on any exercise of Federal authority. But under the decisions of this court, the inhibitions of the Fourteenth Amendment extend to and control the State courts as well as other branches of the State government; hence this attempt on the part of the State courts of South Carolina to create by judicial legislation liability against the telegraph company where none could otherwise exist is a denial of due process of law within the meaning of the constitutional provision. Conclusive authority for this position is found in the decisions of this court

Thus in *Chicago, etc., R. Co. vs. Chicago,* 166 U. S., 226 (41 L. Ed., 979), the law is declared in these words:

> "The prohibitions of the Fourteenth Amendment extend to all acts of the State, whether through its legislative, its executive, or its judicial authorities. * * * A State may not by any of its agencies disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that *its final action would be inconsistent with that amendment. In determining what is due process of law regard must be had to substance, not to form.*" (Italics added.)

In this case, the telegraph company was afforded a hearing in the State courts and of this it does not complain. On

the contrary, it insists that its rights have been taken away by the *substance that was denied* in such trial, that is, the *substantive right it possessed of immunity from suit and freedom from liability* for the acts of the United States, in which it had no interest and over which it had no control.

In *Raymond vs. Chicago, etc., Traction Co.*, 207 U. S., 20 (52 L. Ed., 78), this court held the action of a State board of equalization unconstitutional as a violation of the Fourteenth Amendment. In the course of the opinion the court said:

> "The provisions of the Fourteenth Amendment are not confined to the action of the State through its legislature, or through the executive or judicial authority. Those provisions relate to and cover all the instrumentalities by which the State acts, and so it has been held that whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, violates the constitutional inhibition."

In the case of *Western Union Tel. Co. vs. Ferguson*, 157 Ind., 64; 60 N. E., 677, we find this pertinent statement:

> "Denial of equal justice, wrongful discrimination between persons in similar circumstances is as vicious in judge-made as in statutory law."

As authority for the proposition just quoted, the court cited, among other cases, the decision of this court in *Yick Wo vs. Hopkins*, 118 U. S., 356 (30 L. Ed., 220). The same principle has been stated and applied in numerous cases, among which may be cited:

Ex parte Virginia, 100 U. S., 339 (25 L. Ed., 676).

Chicago, etc., R. Co. vs. Minnesota, 134 U. S., 418 (33 L. Ed., 970).

Scott vs. McNeal, 154 U. S., 34 (38 L. Ed., 896).

Home Tel., etc., Co. vs. Los Angeles, 227 U. S., 278 (57 L. Ed., 510).

In discussing the effect of the guarantees of the Fifth Amendment we have shown that had such liability resulted from anything authorized by an act of Congress it would have been a denial of due process of law. In so far as these two amendments are concerned there is no difference in principle between an unconstitutional act on the part of Congress and an unconstitutional act on the part of the State; therefore in the light of the principles declared by the decisions referred to this creating of liability against the telegraph company by the action of the judicial authority of the State of South Carolina is wholly unwarranted and operates to deprive the telegraph company of its property without due process of law.

From what has been said it follows that this judgment, by reason of the protection thrown around the defendant by the Fifth and Fourteenth Amendments to the Constitution, cannot be enforced by the collection of the same out of its property.

CONCLUSION.

The sole issue in this case is the liability of the telegraph company for the acts of the agents of the United States in the operation of the telegraph system owned by such company, but from which it was completely excluded by the paramount authority of the United States.

That such liability does not and cannot exist we have endeavored to demonstrate in this discussion. Beginning with the seizure of the company's lines under the authority of Congress, and the status between the United States and the owner resulting therefrom, we ascertained at the outset the fundamental fact of the existence of a relationship of complete and absolute assumption of the possession, control, and operation of the owner's system by the United States, and an equally as complete and absolute exclusion of the owner from all interest or participation therein. Premising the discus-

sion on the relationship so established, we have successively shown that the owner could not as a matter of fact be liable for the acts complained of, as it was in no way concerned in either their commission or omission, that such liability could not be deduced either from anything in the congressional or presidential action, or from any applicable principle of law, that the United States was the party really liable, but such liability could not be determined or enforced in this action, as it had not consented to be sued, that the provision of the contract relied on to establish a liability that could be passed on to the United States was wholly without such effect, and finally, that the effect of the judgment was to make the owner liable for acts over which it neither had any control nor for which it was in any way responsible, in violation of the guarantees of the Federal Constitution. Once admit the relationship resulting from the status created between the United States and the owner and the conclusions we have drawn follow as logically as the successive steps in the solution of a problem in geometry, and so following they lead just as inevitably to one, and only one, result—that the Western Union Telegraph Company is not, and cannot be made, liable on a cause of action arising out of the operation of its system by the sovereign Government of the United States.

The judgment of the Supreme Court of South Carolina should, therefore, be reversed, and a reversal is respectfully prayed.

RUSH TAGGART,
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APPENDIX.

EXHIBIT A.

1. EXTRACTS FROM CONGRESSIONAL RECORD OF JULY 13, 1918.

Mr. GORE. Mr. President, I offer another amendment, which I send to the desk and ask to have read.

The PRESIDENT pro tempore. The amendment will be stated.

The SECRETARY. It is proposed to add a new section, as follows:

> "That in case the President shall take over any of the properties above described and shall enter into any agreement with the owners, lessees, or operators thereof, all such agreements shall contain, in so far as applicable, the same requirements, conditions and stipulations as to liability to and exemption from taxation and the payment thereof as are prescribed in paragraph 3 of section 1, of an act entitled 'An Act to provide for the operation of transportation systems while under Federal control, for the just compensation of their owners, and for other purposes,' approved March 21, 1918, in respect to the taxation and payment of taxes on the part of common carriers under governmental control."

Mr. GORE. Mr. President, some Senators seem to be under the impression that there will be future legislation upon this subject. The pending joint legislation is final legislation upon that point. It authorizes the President to take over the telegraph and telephone systems. It authorizes him to enter into agreements with them. There will be no occasion for future legislation.

The amendment which I have proposed requires the President to insert in these agreements the provision which was embodied in the act confirming the taking over of the rail-

roads. That measure provided that in agreements entered into by the President with the railroads the war taxes should be paid out of the just compensation of the railroads and all other taxes should be paid out of their gross revenues and should be charged up as an item of expense. If it was wise to insert that provision in the railway act, it ought equally to be inserted in the present joint resolution.

For that reason I offer the amendment.

The PRESIDENT pro tempore. The question is on agreeing to the amendment offered by the Senator form Oklahoma.

The amendment was rejected.

The PRESIDENT pro tempore. The joint resolution is still in Committee of the Whole and open to amendment. If there be no further amendment to be proposed, the joint resolution will be reported to the Senate.

The joint resolution was reported to the Senate without amendment.

Mr. REED. Mr. President, I desire again to offer the amendment which I offered a minute ago, and when it is read I want to say just two or three words about it.

The PRESIDENT pro tempore. The Senator from Missouri offers an amendment, which will be stated.

The SECRETARY. It is proposed to add at the end of the joint resolution the following:

> "The right and privilege of the people and the press, substantially as heretofore enjoyed, to the unrestricted use of said utilities upon fair and equitable terms shall not be interfered with, except that the governmental business may, when deemed necessary, be given precedence over all other business, and rules may be adopted and enforced to prevent the use of said utilities for any disloyal purpose."

Mr. REED. Mr. President, I hope I can get the attention of the Senators just for a moment to this, I think, very important question. I know we are anxious to adjourn; but I

hope that no Senator is going to allow his convenience for a few minutes to affect his vote on an important matter of this kind.

I am sure there is a misunderstanding as to the character of the action we are about to take. This joint resolution authorizes the taking over of these great utilities. There is no requirement of a single word of future legislation. They can be taken over tomorrow morning if this joint resolution is passed and signed tonight, and the subject-matter will have passed from the control of Congress. The only possible chance we would ever have again at this question would be by an independent measure.

When we adopted the legislation touching the railroads—the only legislation that ever did really authorize the taking over of the railroads—we placed in the bill many safeguards. Among other things, we reserved certain powers to the Interstate Commerce Commission. I shall not take your time at this late hour to go into the details of that bill, but this bill as it is now drawn is simply a general authority to take over these utilities.

Mr. President, let me repeat in part what I said a few moments ago and offer an observation or two. At the present time a citizen has the right to the use of these utilities. They can not be denied to him by the proprietors, and why? Because they are public utilities and they are held in trust by the proprietors in part for the public use. Hence every citizen under the common law has the right to demand the service of these utilities and to demand it without discrimination and with a reasonable degree of care and promptness. But when the Government of the United States lays its sovereign hand upon these utilities it absorbs into itself all the rights the public bore to the State, all the rights of the individual citizens of the United States, because the Government stands for and represents all of them in contemplation of law. If then the Government should tomorrow take over these utilities and there is no clause written into the law

which will perpetuate the legal right of the citizen to this service, any citizen can be refused that service and he is totally and absolutely without redress, first, because the public use has been absorbed in the sovereignty itself and, second, because he cannot sue that sovereignty. Nobody can sue the United States of America, except where Congress has expressly granted that permission.

Mr. SHIELDS. Mr. President——

The PRESIDENT pro tempore. Does the Senator form Missouri yield to the Senator from Tennessee?

Mr. REED. I do.

Mr. SHIELDS. I should like to ask the Senator the construction of the last clause in the joint resolution.

> "Provided, further, That nothing in this act shall be construed to amend, repeal, impair or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

The exception, of course, is not relevant to the amendment the Senator from Missouri proposes.

Now, the question I wish to ask is, Are not the rights of the citizens of which the Senator speaks protected by the provision that this measure shall not be construed to amend, repeal, impair, or affect existing laws referring to taxation or the local police regulations of the several States? Is it not a fact that the right of the general public to be served by public utilities, such as common carriers, hotels, telegraph companies, and telephone companies, comes under the police regulation? Are not all the laws, both common and statutory, governing these public utilities police regulations, and must not the public utility render this service, and is not that preserved in the bill?

Mr. REED. If the right of a citizen to send a telegram is

a police regulation it is news to me. The right of a citizen to send a telegram rests upon the common-law principle that these concerns are quasi public in their character, and that having undertaken to serve a public duty of that kind a citizen has a right to employ them.

Mr. SHIELDS. If the Senator will allow me to make a suggestion, is it not a fact that the right is born of the duty imposed upon the public utility company, because the citizen has no property and no interest of any kind in the property or the service of the company except as the police regulation requires the company to do certain things?

Mr. REED. It does not rest on that. Police regulations are for the protection of public morals and of public peace. The other rights are in their nature such as a suit could be brought to enforce.

Police regulations—I read from Black's Law Dictionary:

> "Laws of a State, or ordinances of a municipality, which have for their object the preservation and protection of public peace and good order, and of the health, morals and security of the people."

So, Mr. President, for once the distinguished lawyer and Senator, I think, is in error. The purpose of those who drafted this resolution and wrote the exception to the law was not to preserve any such rights as I am discussing.

Mr. GORE. Mr. President——

Mr. REED. Just one moment, until I finish this sentence. The exception in the bill was intended, first, to preserve those laws which affect taxation, and then it says "or the lawful police regulations of the several States." Neither of them has anything to do with interstate messages. The police regulations of the States, I think, that are referred to here are those rules and regulations which are adopted for the preservation of the public peace of the community. I yield to the Senator from Oklahoma.

Mr. GORE. Mr. President, I think the Senator from Missouri is eminently correct in his interpretation of this clause, and the history of the clause might shed additional light upon the subject. This proviso is imported from the railroad act. It was inserted in that act, of course, to protect the rights of the State over taxation and to protect the police powers growing out of the right of certain States to make regulations with respect to separate cars that ought to be preserved inviolate.

Mr. REED. The Senator means separate cars for white and colored.

Mr. GORE. Yes, sir; that is the origin of that part of the proviso. Of course it has no relation here, but was simply bodily transported into this act.

Mr. SHIELDS. The courts, both Federal and State, have held the laws for the separation of the races on cars and in public places to be police regulations.

Mr. GORE. Certainly; that was my suggestion and it was to preserve that.

Mr. SHIELDS. At common law the regulation of charges upon vehicles, charges at hotels, and many other things were police regulations, and the duty of the common carrier to serve all was held to be a police regulation. Our statutes upon the subject are only supplementary of the common law, applied to the new public utilities that have arisen in latter days.

Mr. REED. Mr. President, the Senator has expressed his view and I have expressed mine. I am not going to be conceited enough to affirm that I am right, but I undoubtedly think I am right. If the right of the citizens to use the telephone is a police regulation and comes under the police regulation it is news to me, but I have frequently found that I run across something I never heard of before and that I have been in ignorance of. But let us assume that the Senator from Tennessee is right, I do nothing in this amendment but reaffirm and reassert a right and make it clear.

When these utilities are taken over the administration of their business affairs will be turned over to a vast multitude of men. It almost always happens that some men put into public position become more or less arbitrary, and if they are under no restraints whatever great damage and injury may be done. I think you make a mistake when you pass this bill and pass it in such a form as to make it as obnoxious as possible. I think it will do no harm to say to the people of the United States your right to use these instrumentalities is fully preserved. I am sure under ordinary conditions and circumstances an amendment of this kind would be accepted. It is not put in here for any purpose in the world except to cover what I believe will be a defect in the law governing these utilities after they are taken over. It preserves a right that all of you expect and wish and hope will be preserved.

Now, Mr. President, I do not care to argue it further for I do not want to take the time of the Senate.

Mr. KNOX. Mr. President, I would like to say one word in regard to the amendment. It seems to me a pity to enact this legislation after this proposition has been made and reject it. It is only writing into the resolution that which is approved as a matter of course. It is not a right in my judgment that rests in the police power. It is a right that grows out of the nature of the service that these corporations offer to render to the general public, and we are only writing into the resolution a proposition that in our opinion no operations of these lines, if they are taken over by the Government, will interfere with that natural right. The amendment contemplates and specifically provides that in any situation where the private right and the Government right conflict the private right must give way. I hope the amendment will be adopted.

The PRESIDENT pro tempore. The question is on agreeing to the amendment proposed by the Senator from Missouri (Mr. Reed).

* * * * * * *

So Mr. Reed's amendment was rejected.

* * * * * * *

Mr. LEWIS. Mr. President, I merely wish now to say that the subject-matter of this amendment respecting the wire companies and the protection of the newspapers and the press will all be taken care of by proper regulations when these companies pass into the hands of the Government. There need be no fear but that they will be taken care of after consultation with the owners and those who are interested.

Mr. PENROSE. Similar to the railroad regulations, I suppose.

Mr. LEWIS. Very similar, because such has been done, I will say to the Senator.

Mr. PENROSE. Increased rates, miserable accommodations for the traveling public, and general scandal and discontent all over the country.

Mr. LEWIS. The accommodation has not been as generous as we should like, but that is because the demands of the war have monopolized opportunity.

Mr. REED. Mr. President, I cannot restrain from expressing the satisfaction I have at the official notice as to just how the business is to be managed.

* * * * * *

So the joint resolution was passed.

2. EXTRACTS FROM CONGRESSIONAL RECORD OF JUNE 10, 1919.

Mr. SHEPPARD. Mr. President, I desire to address a question to the chairman of the committee, the Senator from Iowa (Mr. Cummins). Can the Senator tell me about claims for damages accruing during the period of Government own-

ership? Will the companies be in position to plead that they were Government agencies and therefore secure immunity from suits?

Mr. CUMMINS. Unfortunately, Mr. President, the original act made no provision for bringing suit against the Government. The committee believed that it was not wise to enter upon that subject at this time. Personally my opinion is that if all the systems were under Federal control or in the possession of the Government, no suit would lie against the companies which theretofore had operated them, and that any suit arising out of the operation of the Government would be brought against the Government, and under our law it would necessarily be brought in the Court of Claims.

Mr. SHEPPARD. I have an amendment prepared prohibiting the companies from pleading in suits for damages the fact that they had been Government agencies, but if the chairman of the committee does not think it wise to go into this matter at present I shall not press the amendment.

Mr. CUMMINS. I think there is a general law which confers jurisdiction upon the Court of Claims in such cases.

Mr. ROBINSON. Will the Senator yield for a moment? The chairman of the committee is familiar with the last proviso of the act approved July 16, 1918, which reads as follows:

> "*Provided further*, That nothing in this act shall be construed to amend, repeal, impair, or affect existing laws or powers of the States in relation to taxation or the lawful police regulations of the several States, except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by such system or systems."

I do not know what the effect of that provision is, but it was evidently intended to preserve these rights.

Mr. CUMMINS. I think it was intended really to preserve in the States the power or authority of regulation over such

rates. But the Supreme Court of the United States, as yo
will remember, a week ago yesterday declared that notwit
standing that provision in the law the Postmaster Gener
had the full and complete authority to make rates, not on
interstate rates, but State rates as well.

I am inclined to think that would not cover the case of
suit, and anyone who has suffered damage of that kind w
have to seek his remedy against the United States precise
as every other citizen seeks a remedy when the Governme
has wronged him.

Mr. SHEPPARD. Was this matter brought before the co
mittee during its hearings?

Mr. CUMMINS. I do not remember that it was; I cann
recall, but I am inclined to think it was not.

Mr. SHEPPARD. Is it the opinion of the Senator that it
not within the power of Congress to provide that these co
panies may be made responsible in damages by suits of t
character indicated.

Mr. CUMMINS. I do not think you can make the co
panies which formerly operated the properties responsib
for torts committed by the Government; but it is possible
provide—this is a first impression—that suits may be broug
against these companies in the various jurisdictions, and th
any sums paid out by reason of damages recovered could
reckoned as a part of the cost of operation, and in that w
the Government be made responsible for the damages.

Mr. UNDERWOOD. Mr. President, if the Senator will
low me, I desire to say that it seems clear that after the G
ernment took possession of this property any resulting da
ages growing out of the possession of the property lie agai
the Government and not against the owners of the proper
If the Government were to take the Senator's automobile
a war emergency, and the man who was driving the car r
over somebody and injured him, the Senator would not
liable because it was his car, but the Government would
liable because it was its act. Of course, those causes th

arose before the Government took possession still exist against these companies—there is no question about that—but as to anything that arose during Government control and operation these companies have nothing to do with.

Mr. SHEPPARD. But suppose it is provided that any judgment shall be charged to the operating expenses of the systems during the period of Government control and shall be taken out of the receipts during governmental control?

Mr. UNDERWOOD. But you cannot divorce the Government from the right, as it ultimately has to pay. Of course, that would not be making the Government pay because the Government gets the receipts and then pays its lease for the system. If you did that, you might take away the right of the Government to defend itself, and you might have actions lying against the Government that were unjust.

Besides that, I doubt very much whether a clause of that kind would be constitutional. Even if we pass the bill making these companies liable for the unlawful acts of the Government during its operation, and judgment was rendered, would that not be taking private property without due compensation? It would be making an individual pay for an act which the Government or somebody else committed. It seems to me that clearly it is within the scope of the constitutional inhibition against taking private property without just compensation; and even if we put a clause of that kind into the bill, I do not believe it would pass the courts.

Mr. CUMMINS. Mr. President, I hope the Senator from Alabama will not misunderstand me. In the way he has just stated it, it would undoubtedly be unconstitutional; but when the Government comes to pay the compensation due to these various companies during Federal control it must, if it adopts the plan of net income, allow them damages, for they are part of the operating expenses. If a private citizen recovers from a company for damages during that period and it is permitted to charge the judgment into operating expenses, the Government would have to pay it only once, and it would

be entirely fair, although it is open to the objection that the Senator has suggested in regard to the Government having an opportunity to defend. It would have no opportunity to defend against a claim of that kind.

Mr. UNDERWOOD. It seems to me that as to damages for wrong done to individuals during Government control, if there is a just case against the Government during that time, the individual citizen ought to have his opportunity. I am rather inclined to think that the general statutes in reference to the jurisdiction of the Court of Claims are broad enough to cover cases of that kind now; but possibly they are not. If they are not, the jurisdiction ought to be broadened in the Court of Claims, so that the citizen who is injured by the Government during the period of control might have his day in court. It seems to me that is the only place a case would lie.

Mr. SHEPPARD. Does the Senator not realize that it would be a great hardship to have citizens of this country go into the Court of Claims to press their various suits for damages?

Mr. UNDERWOOD. Most of those cases would fall within the jurisdiction of district courts. The district courts have concurrent jurisdiction with the Court of Claims up to $10,000, and where the case involved not more than $10,000 I do not know that any great hardship would be incurred.

* * *

Mr. SHEPPARD. Mr. President, for the information of the Senate I shall ask that the amendment which I have in mind be read in order that it may be incorporated in the Record. I trust opportunity will offer hereafter for the consideration of the question I have presented.

The VICE-PRESIDENT. The amendment proposed by the Senator from Texas will be stated.

The SECRETARY. It is proposed to add after the last proviso in section 1 the following:

> "*And provided further,* That actions on claims for loss and damage on account of the acts or omissions

of the agents and employees engaged in the operation of such systems accruing during the period of control of the same under the joint resolution approved July 16, 1918, may be maintained in courts of competent jurisdiction, and in any such action no defense shall be made thereto that any such telegraph, telephone, marine cable, or radio system or systems was an instrumentality or agency of the Federal Government, and any judgment therein rendered shall be charged to the operating expenses of such systems during such period of governmental control, and compensation made therefor as provided in such joint resolution: *Provided*, That no process, mesne or final, shall be levied against the property of any such system or systems to satisfy any such judgment."

The VICE-PRESIDENT. The question is on the substitute

The amendment was agreed to.

Mr. WATSON. Mr. President——

Mr. CUMMINS. A parliamentary inquiry, Mr. President.

The VICE-PRESIDENT. The Senator will state it.

Mr. CUMMINS. The vote just taken was upon the committee amendment?

The VICE-PRESIDENT. It was upon the committee amendment.

EXHIBIT B.

ORDER No. 2474.

December 12, 1918.

Whereas the Congress of the United States in the exercise of the constitutional authority vested in them, by joint resolution of the Senate and House of Representatives bearing date of July 16, 1918, resolved: That the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security

or defense, to supervise, take possession, and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation of the exchange of the ratification of the treaty of peace, and

Whereas, the President of the United States, by his proclamation of the 2d day of November, 1918, declared that he deemed it necessary for the national security and defense to supervise and take possession and assume control of all marine cable systems and to operate the same in such manner as may be needful or desirable, and did, by said proclamation under and by virtue of the powers vested in him by said resolution and by virtue of all other powers thereto him enabling, take possession and assume control and supervision of each and every marine cable system and every part thereof owned or controlled and operated by any company or companies organized and existing under the laws of the United States or any State thereof, including all equipment and appurtenances thereto whatsoever and all the material and supplies, and did also by said proclamation direct that such supervision, possession, control, and operation of said marine cable systems by him undertaken be exercised by and through the Postmaster General, Albert S. Burleson, which said proclamation further directed that until and except so far as the Postmaster General shall from time to time by general or special orders otherwise provide, the owners, managers, boards of directors, receivers, officers, and employees of the various marine cable systems shall continue the operation thereof in the usual and ordinary course of business of said systems in the names of their respective companies, associations, organizations, owners, or managers, as the case may be, and that from and after 12:00 o'clock midnight on the 2d day of November, 1918, all of the marine cable systems included in said proclamations *shall conclusively be deemed*

within the possession and control and under the supervision of said Postmaster General without further act or notice;

And whereas by Order No. 2351 of the Postmaster General, dated November 18, 1918, it was directed that all of the officers, operators, and employees of the marine cable companies continue in the performance of their existing duties, reporting to the same officers as theretofore, and on the same terms of employment, in which order it was announced to be the purpose to co-ordinate and unify these services so that they might be operated as a national system, with due regard to the interests of the public and the owners of the properties;

And whereas by letter of the Postmaster General, dated December 4, 1918, addressed to Mr. Clarence H. Mackay, president of the Commercial Cable Company, copies of which were transmitted to Mr. George G. Ward, vice-president of the Commercial Cable Company, and to Mr. Newcomb Carlton, president of the Western Union Telegraph Company, it was declared that the interest of the public service during the present emergency necessitated the unification in operation to the fullest extent possible of the cable systems leading from this country to Europe so that the full capacity of all the cables might be available to the public and the press which it was manifest could only be accomplished through the operation of the two systems under one management, and that after having made a survey of the situation and becoming satisfied that the object sought could best be accomplished by placing the cables under the operating head of the Commercial Cable Company, it was directed that Mr. George G. Ward, vice-president of the Commercial Cable Company, assume the management and operation of both the Commercial Cable System and the cable systems operated by the Western Union Telegraph Company;

And whereas in his letter of December 6, 1918, said Newcomb Carlton not only acquiesced for his companies in the aforesaid directions for unification in operation of the two cable systems under said George G. Ward, the operating head

of the Commercial Cable Company, but pledged his hearty co-operation therein, stating his judgment to be that such unification would result in an increase in the total daily capacity of the cables comprising the two systems, and also in important economies in operation;

And whereas in his letter of December 11, 1918, Mr. Clarence H. Mackay, president of the Commercial Cable Company, advised the Postmaster General that said George G. Ward has taken no step to unify the properties by taking possession of the cables controlled by the Western Union Telegraph Company, and has no intention of doing so;

And whereas in his said letter of December 11, 1918, the said Clarence H. Mackay, president of the Commercial Cable Company, has shown the hostility of the officials of the said company to any plan of unification of operation of the cable systems, and said Ward has declined to comply with said instructions of the Postmaster General of December 4, 1918, and

Whereas, the public interests require that the operation of the said cable systems be unified not only for improvement of service, but also that important economies in operation may be effected during the period of Government control which can be accomplished only by placing such unified operation under the management of persons in complete accord with the ends desired,

Now, therefore, it is ordered and directed that so much of the said Order No. 2351 as directs all of the officers, operators, and employees of the marine cable companies to continue in the performance of their present duties, is modified so as to exclude Clarence H. Mackay, George G. Ward, and William W. Cook from any connection with the supervision, possession, control, or operation of any and all marine cable systems or any part thereof, the supervision, possession, control, and operation of which was taken over and assumed by the President in his said proclamation of November 2, 1918, and said Newcomb Carlton is hereby directed to assume the

management and operation of each and all of the marine cable systems, the supervision, possession, control, and operation of which was taken over and assumed by the President and by him directed to be exercised by and through the Postmaster General so far and to such extent as is authorized by the said joint resolution of Congress and the said proclamation of the President. The said Carlton will proceed at once to the execution of this order and shall carry into effect directions which have been given for the unification of the operation of said cable systems and such other directions hereafter to be issued.

A. S. BURLESON,
Postmaster General.

EXHIBIT C.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK.

L. 21-49.

ALFRED W. HEIL and JOSEPH S. HEIL, Co-partners Trading under the Firm Name and Style of Heil & Co.,

against

UNITED STATES OF AMERICA.

Demurrer to a Petition under the Tucker Act for Failure to Allege Any Cause of Action.

The petition alleges the President's seizure of the marine cables of the Commercial Cable Company on November 2, 1918, under the war power and his consequent operation of them and that during the time of such operation the plaintiffs paid the proper tolls and delivered to "Commercial Cable

Company" as an "agency" of the United States, a cable message to be sent to London, which "the company," *i. e.*, the Commercial Cable Company, promised to transmit. That "the respondent," *i. e.*, the United States, never transmitted the message at all and because of that failure the plaintiffs lost. The message was for the purchase of £100,000 sterling and the loss depended upon fluctuations in British exchange.

J. Julien Sutherland and Peter B. Olney, Jr., for the United States.

Henry Amster, for the petitioner.

LEARNED HAND, *D. J.*:

It is conceded that were these allegations contained in the complaint against the Commercial Cable Company before or after the operation of their property by the President the demurrer would not lie. The question is whether any similar legal duties or obligations resulted during that period. None such can result unless the United States has created them by statute, and the only relevant statute is the Tucker Act, which provides for suits upon "all claims * * * founded * * * upon any contract, express or implied, with the Government of the United States * * * in respect to which claims the party would be entitled to redress against the United States, if the United States were suable. So the parties have correctly presented as the sole question whether the claim is founded upon an express or implied contract with the Government of the United States.

For procedural purposes the failure to transmit or deliver a telegraph message may be made to sound in contract. The company promises, though not verbally, to transmit the message in consideration of the tolls. But quite independent of its promise it is under a duty to accept, transmit and deliver; a duty arises from the statutes which create it or permit its activities. *Ellis vs. American Tel. Co.*, 13 Allen, 226, 232; *Smith vs. W. U. Tel. Co.*, 83 Ky., 104, 113. That duty

makes the promise unnecessary and indeed would make *nudum pactum* a true bilateral contract to receive and transmit a message. The sender, having got no promise to do what the company was not independently bound to do, would have received no consideration. Besides, the terms of the promise are not within the company's pleasure; some things they may reserve, some they may not, depending upon the interpretation of their imposed duties. At best it is merely an *obligato* irrelevant to the melody set by the specific command.

Nevertheless, after the President took over the cables he was under no such duty imposed by law to accept messages, nor was the United States. His decision or the Postmaster General's to accept cable messages as before, however imperatively required for the convenience of the public, was necessarily voluntary, and it is quite conceivable that circumstances should have arisen which would have resulted in their total suspension. This applies as much to every message as to all, there being as little duty imposed upon him to send a given message as to send any class. The right to discriminate between messages was indeed freely exercised during the war at the delegated discretion of the public authorities. The situation was therefore quite changed during the period of governmental operation, and there was no right to send or duty to receive cables except as it arose from the free determination of officers of the United States in the discharge of their duties.

Of course, the Tucker Act is not to be interpreted verbally; nor should I think the fact in any way determinative that the sender of a cable message might sue a telegraph company *ex contractu*. The reason why it seems to me that the act applies here is that if the United States had not the immunity of a sovereign, there would for the foregoing reasons have been no breach of positive duty ("subtraction"), and there would have been a breach of contract. That is precisely the situation which the act was drawn to meet. Con-

gress meant to assume liability for the acts of such of its agents as had the power in the discharge of their duties to assume or refuse engagements upon the faith of which other citizens should rely. It did not mean to assume liability for the proper discharge of duties which it imposed upon those agents by virtue only of positive law.

It was urged at the bar that this result might expose the United States to serious loss and impede it in the discharge of its governmental functions. This is of course an irrelevant consideration when the purpose of the act is clear, but here it is out of place in any event. Whatever be the justification in policy of the sovereign's immunity, the first consideration ought to be this, that in the performance of its voluntary engagements with its citizens it should conform to the same standard of honorable conduct as it exacts of them touching their conduct with each other. Any policy which would exempt the United States from the scrupulous performance of its obligations is base and mean; it serves in the end to bring the United States into contempt, to prejudice it in its dealings when it enters into the common fields of human intercourse, and to arouse the indignation of honorable men. Congress by the Tucker Act meant to avoid such consequences.

The demurrer is overruled.

June 15, 1920.

A true copy.

[Seal of District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.